THE

MONTHLY LAW REPORTER.

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THE WARD TRIAL. MR. CRITTENDEN.

To the Editors of the Monthly Law Reporter:[1]

In the review of the Ward trial in your July number, 1854, the facts and incidents detailed by you as a part of the history connected with that trial are so grossly perverted and misrepresented, that it is not less an act of justice to yourselves, than a tribute to the cause of truth, to call your attention to the evidence which will correct and disprove them. The high character which your journal has sustained with the profession throughout the Union, the undoubted ability and legal learning displayed in its editorials, the unvarying impartiality which has characterized its course, and its manly defence of the profession from the assaults of ignorance and malevolence, constitute sufficient evidence that you have made no wilful perversion or misrepresentation to affect the character or standing of any one connected with this celebrated trial. Yet no one can read the article referred to, who is intimately acquainted with the facts, but must be convinced that you have been furnished with the history you have published from the partisan source which has so perseveringly and malignantly misrepresented the distinguished gentleman "*who volunteered his services*," or that you have not been

[1] The following communication, written, as we are informed, by a member of the Bar of Kentucky, has been forwarded to us with the request that it might appear in our journal. — Ed.

sufficiently careful in scrutinizing the evidence of the truth of many statements you have made calculated seriously to affect him.

You speak of the "intense indignation" created in Louisville by the announcement of the verdict of acquittal. "The jury," "the prisoner," "the swift witness" for the defence, "and even some of the counsel were burnt in effigy." This is true; but in a journal professedly devoted to the inculcation of the doctrines of law and order, in a long article, the whole tone of which seems to be intended as a slur on Kentucky justice, and in which you complacently contrast Kentucky with your own "more favored State," it is a matter of no little surprise that mob violence should not only pass unrebuked, but receive an implied sanction by your endorsement "of the character of the persons who composed it and directed the proceedings." You say, "It was not a tumultuous mob, nor assembled by persons ever ready to take advantage of any occasion of public excitement. It was mainly constituted of, and *altogether* directed by, intelligent, educated and influential citizens, who appeared to feel, with solemn conviction, that the verdict had done foul wrong to the name and honor of Kentucky, and had converted the proceedings of justice into a contemptible farce. By a not unnatural process of mind, this deeply-seated, irrepressible indignation turned itself against the prisoner's counsel, and especially against the distinguished gentleman who volunteered his services." You add that "Deputations and addresses from all parts of the State have urged him to resign his seat in the United States Senate; a society in a neighboring State withdrew its invitation to him to officiate upon some public occasion; a convention of medical gentlemen at St. Louis, who before the trial would have deemed themselves honored by his presence, so far forgot their self-respect as openly to insult him."

A more unfair presentation of this case, or a grosser perversion of all truth, has seldom before been embodied in the same number of words. It is alike due to truth and justice to give a brief but authentic history of this peaceable, and quiet, and orderly meeting, "*altogether directed by intelligent, educated, and influential citizens.*"

On Friday, the 28th of April, a hand-bill addressed "To THE WOLFE BLOODHOUNDS OF LOUISVILLE" was issued from the office of the "Louisville Democrat," and the next

morning the following was published in the "Louisville Courier," in a conspicuous manner:

"To the Wolfe Bloodhounds of Louisville.

Fellow 'Bloodhounds,'

The most atrocious murder ever perpetrated in any community was the killing of Mr. W. H. G. Butler by Mat. F. Ward. It is a sacred and solemn duty to the dead, and to the now blackened and dishonored name of Kentucky, from whence truth has fled and justice has been disregarded, to call a meeting of the 'Wolfe Bloodhounds of Louisville,' that we may give expression to our feelings in reference to this most outrageous verdict of a Hardin county jury, and the man who dared stigmatize American citizens as

'Bloodhounds,'

because they desired justice to be done the murderers of the lamented Butler. We propose this (Saturday) night, at the Court House, the time and place for meeting.

Come one, come all, and let Kentucky give evidence that there are men that money cannot buy. Turn out, fellow 'Bloodhounds,' and vindicate yourselves. There will be speeches and resolutions expressive of the *just indignation* of our citizens.

The People."

This notice, and others similar to it, were scattered by thousands over the city on Saturday morning. No one in the city was, or could be, ignorant that such calls invoking the people to assemble as "Bloodhounds," would bring together a mob of the most violent character. As evidence of what was expected, Mr. Robert J. Ward, the father of Mat. F. Ward, was advised, and he did abandon his residence. Mr. N. Wolfe, one of the counsel, also abandoned his house. The Mayor of the city advised the people, and the fact was previously well known, that Mat. F. Ward, and his brother, Robert J. Ward, Jr., were not in the city. Instead of calling the meeting for daylight, it was to be after night. When the hour arrived, the Court House hall was soon filled to overflowing, and the Court House yard was also filled. Many of the most respectable citizens of Louisville went into the Court House, with a view, as far as possible, to allay the public excitement, and prevent violence.

They passed resolutions, but had the decency to make

no allusion whatever to the course pursued by Mr. Crittenden. Far different was the scene enacted in the Court House yard, and as you allude to the natural process of mind, by which the "*irrepressible indignation*" was turned against the distinguished gentleman who volunteered his services, it must, of course, be to this meeting that you refer, when you say it was "*altogether* directed by intelligent, educated, and influential citizens." Old clothes were bought and stuffed and brought to the scene of action, to represent the objects of popular vengeance. Resolutions were passed, that Mr. Nat. Wolfe must resign his seat in the State Senate, and go to parts unknown; that "Mr. Crittenden must resign his seat in the United States Senate," and that "the Wards must depart to their Arkansas plantation." The effigies of John J. Crittenden, Nathaniel Wolfe, George D. Prentice, Matt. Ward, and the jury of Hardin county were hung up and burned. In the mean time, a crowd, estimated at between two and three thousand, assembled around the mansion of Robert J. Ward, the father, stoned the house, destroyed the windows and window-sash, demolished an extensive glass conservatory, full of the rarest plants and flowers, and finally set the house on fire in front. The Louisville Journal, in giving an account of the incidents of this fearful night, says:

"The fire bells were sounded, and the Kentucky and Mechanic Fire Companies were the first to arrive at the scene of the conflagration. They laid their hose, but the mob immediately cut it with their *bowie knives*, and thus rendered the engines useless. The Washington and Hope companies then arrived and laid their hose, and forthwith a leader of the rioters, drawing a weapon, swore that he would kill the first man that took a pipe, but the threat did not avail. Henry Green and Jacob Bernel took the pipe of the Washington, and Dr. W. R. Jacob that of the Hope. D. W. McCarty, as chief director of the Washington, protected his pipe, and Henry Smith and Mr. Bly stood below protecting and lightening his hose. A pistol was aimed and snapped at the pipe director, within a few feet of his breast, but it missed fire. Two or three pistols were discharged, yet the dauntless firemen did their duty without quailing in the midst of ten times their own numbers, and the flame was soon conquered. The Washington company, when all was over, stationed thirty men at Mr. Ward's house, who stayed there all night to meet any sub-

sequent attack of the incendiaries. It was ascertained the next morning, that a fire had been kindled upon the carpet in one of the chambers, with a view to the certain destruction of the house, but it had gone out of itself, thus disappointing the expectations of the 'Bloodhounds.'"

The above extract has been given from the Journal, because it was copied into the Daily Courier of the 3d of May, which paper had been charged, in conjunction with the Democrat, with getting up the mob by their incendiary publications. From the comments of the Courier may be gathered what are the admitted facts attending this transaction. The Editor commences by saying that D. W. McCarty was an employee of the Courier office; that when he arrived at the residence of Mr. Ward, "he was firmly, but not boisterously told that he had better let things alone." Of the persons stationed all night to protect the house, three were employees of the Courier office. He continues: "The Journal states that the hose of one of the engines was cut with bowie knives, and thus rendered useless. At one time, a similar demonstration was made upon the hose of another of the engines, when a number of firemen and citizens sprang to its protection." He adds: "Mr. McCarty was the first person who was permitted to go up stairs after the house was entered by the Washington's pipe. He found the doors all fastened, so as to satisfy him that no rioter or other person had been there for mischief. The carpets were warm, and some of the paint was melted and running, but he discovered no appearance of a fire having been kindled in either of the chambers as stated by the Journal, and is certain that no such outrage had been committed or attempted."

After remaining a long time around the house of Mr. Ward, the mob started off for the house of Mr. Wolfe. It is said, that they seemed bent upon its destruction, and that it was the avowed determination of many of them to take Mr. Wolfe's life if they could find him. However this may have been, they refused to listen to Col. Preston, the distinguished member of Congress from the Louisville district, and it is said, greeted him with insults.

Mr. Thomasson a former member of Congress from the same district, made also an ineffectual effort to address them. At length Mr. Gibson rose, and on account of having been one of the prosecuting attorneys against Matt. Ward, they listened to him, and were dissuaded from further violence,

but still eggs and pavement stones were thrown, before the mob would depart. This whole proceeding, which every decent man out of Louisville, has not hesitated to pronounce infamous, you have described as "A meeting remarkable, not only for its extraordinary numbers, but equally so for the character of the persons who composed it, and directed the proceedings." Upon what evidence you have drawn these conclusions it is difficult to conjecture. Your allusion is to that meeting which by a natural process of mind, you say, turned its indignation against the prisoner's counsel, and especially Mr. Crittenden. That meeting, before any report of his speech, simply because he had volunteered to defend the son of an old and long tried friend, denounce him in unmeasured terms, say that he must resign his seat in the United States Senate, and burn him and others in effigy, yet you say, that this meeting was "constituted of, and altogether directed by, intelligent, educated and influential citizens."

It is a vile slander upon the intelligent, educated and influential citizens of Louisville. Many such may have been and doubtless were present, led there from curiosity or to repress violence, but we deny that the proceedings were directed by them, or even countenanced by them. Such men had nothing to do with the atrocious outrages of that night; they had nothing to do with the burning of such a man as John J. Crittenden in effigy; they could not and did not countenance, as we must presume, the sending forth of the "bloodhound," hand-bills, as evidence of their intelligence and education; they did not join in the hue and cry against the father, to excite public vengeance against him, because he had exerted himself to save his son; they did not direct the lawless outrages upon his property; they did not afterwards make light of it, by calling it sneeringly, mere "flower-pot indignation."

The offices from whence the bloodhound hand-bills were issued, seemed especially anxious to show that they were paid for printing them. With all the partisan excitement growing out of this whole affair, they could not help feeling that some apology for such a document was necessary on their part.

After endorsing the character of this lawless mob, to give force to its coarse condemnation of Mr. Crittenden, you add, that "Deputations and addresses from all parts of the States, have urged him to resign his seat in the United States

Senate." This statement is utterly destitute of truth. No one in Kentucky has ever heard of a deputation or an address to him to resign his seat in the United States Senate. It is true that meetings have been gotten up mostly in obscure places, generally sparsely attended, where resolutions to that effect have been passed, but in every instance where an investigation into such meeting has been made, it has resulted in showing it to be composed of a few noisy persons acted upon by extraneous influences.

In one instance a meeting was published as having been held at Rumsey, in McLean county, in which the conduct of Governors Crittenden and Helm was severely condemned. Mr. Dyer, who was named as one of the persons acting a conspicuous part in that meeting, in a letter to the Editors of the Courier, in which paper the proceedings were published, says: "The fact is, there has been no such meeting in this county or its vicinity, or any attempt to get up a meeting on this subject; there is not one word of truth from the beginning to the end of this forged and spurious record. Had such a meeting been got up here, I will venture the assertion, that no resolutions could have passed any respectable meeting of our citizens, stigmatizing in such indignant language, such men as J. J. Crittenden and J. L. Helm." We have no hesitation in saying that Mr. Crittenden's course is fully approved by the great mass of the legal profession in Kentucky. The bar in a distant circuit have passed strong resolutions to that effect, and the following letter has been signed by upwards of forty members of the bar practising before the Court of Appeals of Kentucky, endorsing in decided and emphatic terms, his whole conduct.

"Frankfort, Ky., Sept. 12, 1854.

To Hon. J. J. Crittenden,

Dear Sir, — The undersigned members of the Bar, practising before the Court of Appeals of Kentucky, have witnessed with regret and mortification, the newspaper attacks upon you for appearing as counsel on the trial of Matt. F. Ward; and feeling that it is not less an act of justice to the profession to which they belong, than to yourself, one of its most distinguished ornaments, beg leave, without entering into detail, to express to you their conviction, that there has been nothing, either in the manner of your appearing, or in the conduct of the case, on your part, inconsistent with the

highest professional propriety, and that your entire conduct has met their full and cordial approbation. We have the honor to be, &c."

"*A society in a neighboring State, withdrew its invitation to him to officiate on some public occasion.*"

This also is untrue. Mr. Crittenden, some time before he appeared on the Ward trial, was invited to make an address before an Agricultural Society in Indiana, which, from other pressing engagements, he was compelled respectfully to decline. He declined before he ever appeared in the Ward case. At a meeting held at Hanover College, Indiana, after the regular resolutions were adopted, the following was offered.

"*Resolved*, That we, a portion of the citizens of Jefferson county, are decidedly of opinion that we can do without the services of Mr. John J. Crittenden of Kentucky, at our next County Fair."

This is the whole foundation for the publication of the statement that "A society in a neighboring State withdrew its invitation to him to officiate on some public occasion." How, and in what manner this resolution was passed, is fully explained in a letter from a student of Hanover, dated May 6th, 1854, and published in the Louisville Journal of 11th May, thereafter, in which he says:—

"The President, Mr. Dunn, made a motion that the resolutions be adopted. After that form was gone through with, Mr. Latimore, a young student, jumped up and pulled out a strip of paper, from which he read about as follows: 'Gentlemen, Mr. Crittenden has been invited to visit our State Fair next fall and make a speech. I make a motion to invite him to stay at home.' (A long pause!—a good many sneers!) at length, 'I second the motion,' was heard from one of the boys. Mr. Dunn arose and said: 'Well, gentlemen, there is a motion made and seconded, that we invite John J. Crittenden to stay at home—all in favor of this motion will say aye.' A few feeble ayes were heard—then says he, 'those to the contrary say no.' *No, no, no*, was thundered all over the house. The President took his seat, looked very much embarrassed, and said, 'I make a motion that we adjourn. Those in favor of this motion say aye.' 'Aye' was heard in every part of the house, and then we adjourned."

And this is the foundation for the alleged indignity offered

to Mr. Crittenden in a neighboring State. You, finally add, that "a convention of medical gentlemen at St. Louis, so far forgot their self-respect as openly to insult him."

This is doing not less injustice to the Convention, than to Mr. Crittenden, but, like all the rest of this entire paragraph, it is absolutely false. It is true that this statement was made and published in the papers which have manifested such persevering and bitter hostility to Mr. Crittenden, but even these papers have made a retraction by subsequent publications. After the alleged insult, Mr. Crittenden was invited by this Convention to their public entertainment, with a request that he would respond to a toast to be read on the occasion. The whole story of this insult, which has been so widely circulated, and which after being fully refuted at home, has been re-issued in your journal, was founded upon the following incident.

Mr. Crittenden being at St. Louis, visited the Hall in which the Medical Convention was then assembled. A point of order was under discussion. A young member of the Convention, observing him in the room, proposed that he should take the President's chair, then filled by another, in order that the proceedings should be conducted according to strict parliamentary rules. For this the mover was hissed by some of the members present. They have disclaimed any insult to Mr. Crittenden, and were deeply mortified that any such construction should have been placed upon their conduct.

The whole excitement against Mr. Crittenden, in this State, grew out of the fact alone, of his having volunteered in this case. Before it was known what he had said, or what course he had pursued in the defence of his client, he was denounced for having volunteered, and the indignation expressed against him was on this account alone.

You have nobly and eloquently defended him for this act, and we cordially unite with you in saying, "It is passing shameful that a lawyer like Governor Crittenden, against whom, hitherto, no word of reproach has been uttered, should be pursued, insulted and persecuted for no other reason than because in the great distress and heavy affliction of an intimate personal friend, he volunteered those services, which that friend had abundant means, and doubtless ample inclination, to pay for if required. Shame upon any one, who will say that money should have pur-

chased what friendship had no right gratuitously to bestow."

It is well known that the excitement against Matt. F. Ward was very great. The testimony before the examining court was published with severe and bitter comments in two of the city papers, and while the prisoners were in the custody of the law, and incarcerated in close prison, judgment was passed, in advance, upon them; their conduct denounced as diabolical, the public mind inflamed by pronouncing the deed as atrocious as any to be found mentioned in the records of modern crime, declaring that no act had ever come within their knowledge that had so little to palliate it, and much more of the same kind. However a course of this kind might be calculated to shock the moral sense of every legal mind, when the prisoners were in the custody of the law, and awaiting their trial upon the unbiassed testimony which might be brought against them, altogether uninfluenced by popular clamor, it yet had its effect in inflaming the passions of many good men, and in rendering them, according to our well established canons of practice, unfit triers of the alleged crime. For not thus prejudging this case, George D. Prentice, the able and accomplished Editor of the Louisville Journal, was burnt in effigy, and even the respectable meeting in the hall of the Court-house, in reference to this matter, resolved, "That a failure of any portion of the press, to rebuke and condemn an atrocious crime against society, tends to debauch the public virtue, and to destroy the public morals." In advance of the trial, one paper of wide and extended circulation, after indulging in bitter denunciations, declared, "When crimes like this occur, it is our duty, it is the duty of every one having control of the columns of a public Journal, to speak of them as they deserve. He who fears or fails to do so, is false to his obligations to society, and unfit for the position he holds." With an excitement of the public mind, so diffused as these comments were so well calculated to effect, a timid politician, or a timid lawyer, might hesitate before engaging in a defence.

The father of the accused was well aware of the fearful excitement existing against his son. With a delicacy and magnanimity characteristic of him, although exceedingly anxious to have the services of his old friend, Mr. Critten-

den, he forbore to make personal application to him, for fear it might result to his disadvantage or injury in a political point of view. Mr. Crittenden learned this fact from mutual friends. To use his own language, "Mr. Ward and himself had long been personal friends, and a friend he was, to be loved and valued." He adds, "When he was in the deepest distress and agony, it was made known to me that he desired I should appear as counsel for his sons, then imprisoned and awaiting their trial, under a heavy load of prejudice and excitement. Could I, as a professional man, could I, as a *friend*, have refused to do so? No, I could not."

He was not ignorant that a greater or less degree of clamor would be raised against him in case he appeared. Had he been governed by the timid counsels of some of his friends, he would have kept out of the case. But he is not the man to be thus influenced; throughout a long life of unblemished integrity and professional honor, he had acted upon the principle that the bar was the great bulwark and security of the accused and forsaken, from the angry assaults of prejudice or passion. The unblenching courage that leads counsel to stand between the hot avenger and his victim, was his; and woe be, say we, to that truckling and time-serving lawyer who shall falter for an instant in his courage or his efforts in such a case.

"The very responsibility," says he, "of appearing in the case, under the existing excitement, made it the more necessary for me to do it, or appear to be a timid lawyer and worthless friend."

You have illustrious instances of lawyers in your own renowned and venerable Commonwealth, who, under trying circumstances, braved the fury of the moment, and interposed their learning and influence to check the torrent of passions which threatened to banish reason from her throne.

On the evening of the 5th March, 1770, the town of Boston was thrown into a state of dreadful agitation by a murder of five citizens in the streets by a party of British soldiers, under the command of Capt. Preston. You know that the very highest pitch of rage and indignation was excited among the inhabitants of Boston, as well as the whole people of Massachusetts. The populace breathed only vengeance; that deep-seated political animosity which afterwards burst forth into successful revolution, gave in-

creased violence to this vindictive spirit. After deliberation and consultation with each other, John Adams and Josiah Quincy, Jr., yielding all personal considerations to the higher obligations of official duty, at the request of Capt. Preston, who solicited their professional services, agreed to appear in his behalf, and in that of the soldiers. They knew that they were putting to a fearful hazard the confidence of their political friends, their popularity, and that general affection which their public course had attained for them. The aged and venerable father of Mr. Quincy heard the rumor that his son had engaged to act as counsel for the prisoners, and addressed him the following letter:

"*My dear Son*,—I am under great affliction at hearing the bitterest reproaches uttered against you for having become an advocate for those criminals, who are charged with the murder of their fellow-citizens. Good God! is it possible? I will not believe it. I must own to you, it has filled the bosom of your aged and infirm parent with anxiety and distress, lest it should not only prove true, but destructive of your reputation and interests; and I repeat, I will not believe it, unless it be confirmed by your own mouth, or under your own hand.

Your anxious and distressed parent."

It has been truly said that there is nothing in the annals of the bar, or in the records of human courage, loftier in sentiment or more correct in principle, than the reply of the brave and noble-hearted son. It is needless to copy it at large, so well known and so justly appreciated as it is by the legal profession, but we cannot resist the temptation of quoting a few sentences. He tells his venerable parent that, "Before pouring their reproaches into the ear of the aged and infirm, if they had been friends, they would have surely spared a little reflection on the *nature of an attorney's oath and duty*, some trifling scrutiny into the business and discharge of his office, and some small portion of patience in viewing my past and future conduct. Let such be told, sir, that these criminals charged with murder are *not yet legally proved guilty*, and, therefore, however criminal, are entitled by the laws of God and man to all legal counsel and aid, that my duty as a man obliged me to undertake; that my duty as a lawyer strengthened the obligation; that from abundant caution I at first declined

being engaged; that after the best advice and most mature deliberation had determined my judgment, I waited on Capt. Preston and told him that I would afford him my assistance; but prior to this, in the presence of two of his friends, I made the most explicit declaration to him of my real opinion on the contests (as I expressed it to him) of the times, and that my heart and hand were indissolubly attached to the cause of my country."

If Mr. Crittenden had timidly shrunk from appearing in this case, how sadly would his course have contrasted with the heroic and high-principled sense of duty which controlled the conduct of John Adams and Josiah Quincy, Jr. He did not, however, hesitate or falter as to the line of duty to be pursued by him. He says in his letter to a friend in New Orleans: "After considering the matter, and the repeated solicitation of common friends, I determined not to reject the appeals made to me, but to appear in the case, and to render to the accused such professional services as I could. I determined also that I would receive no fee for my services. I believed that I might exact almost what amount of compensation I pleased, and that was felt by me as a reason why I should take none. I shrank from the idea, or appearance even, of bargaining with a distressed friend, or speculating on his misfortunes or his generosity."

After this statement, well might you exclaim, "Shame upon any one who will say that money should have purchased, what friendship had no right gratuitously to bestow." Yet it was for thus appearing as a volunteer, as it was said, that he was so bitterly assailed. The skeleton of his speech, which has since been published, had not then made its appearance. It was not on account of his course of argument, his treatment of the witnesses, or any misrepresentation of evidence, that he was arraigned at the bar of public opinion; *it was for volunteering, alone.*

When the public mind began to settle down into an approval of what you have so well and conclusively defended, it became necessary to vary the attack, and he is now assailed in the columns of your journal for professional misconduct, which "in your opinion accounts for, and in some degree justifies, the general indignation felt and expressed" against him. It cannot account for what existed long anterior to the promulgation of these new charges.

We will, however, notice the charges now made against the propriety of his professional conduct, and if we are not

mistaken, will satisfactorily show how utterly groundless each and every one of them is.

It may not be amiss to premise that the appearance of counsel in a cause to argue against each other, pre-supposes that they will take different views of the same subject. The wisdom of the law has provided this expedient for the purpose of eliciting truth. It is a part of the machinery in the administration of justice. It is the mode which the law has adopted for "troubling the waters, that they may exert their virtues." It is the most efficacious mode which has ever been devised to expose falsehood and discover truth. It is conceded that an advocate "may profess feelings which he does not feel, and may support a cause which he knows to be wrong."

Dr. Johnson, when asked by Mr. Boswell what he thought of supporting a case he knew to be bad, replied: "Sir, you do not know it to be good or bad till the Judge determines it. I have said that you are to state facts fairly, so that your thinking, or what you call knowing a cause to be bad, must be from reasoning, must be from supposing your arguments to be weak and inconclusive. But, sir, that is not enough. An argument which does not convince yourself, may convince the Judge to whom you urge it; and if it does not convince him, why, then, sir, you are wrong and he is right. It is his business to judge; and you are not to be confident in your opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion."

If a weak and inconclusive argument is urged before either the judge or jury, it belongs to the opposite counsel to expose its fallacy, or to show its want of application. We hold that counsel is not amenable to public censure for erroneous deductions, wrong inferences or false reasoning.

Your first charge is, that the admission of Robert J. Ward, Jr., as a witness, who was jointly indicted with the defendant, was a gross departure from the plainest principles of law, and that the responsibility rests between Mr. Crittenden who urged, and the judge who allowed it." The judge, upon full argument, before the occurrence of this case, had decided this question the same way. Many of the other judges of the State had given similar decisions. Now, admitting that the decision was wrong, we put it to the candor of every impartial mind to say, if Mr. Crittenden would not have failed in the discharge of his duty to his client, if he had not argued the admissibility of

this evidence, and left it to the judge to decide. But we hold that the decision was right, notwithstanding the broad assertion that no lawyer can have a doubt on the point, and that it was in strict accordance with the long established course of adjudication in the State of Kentucky. It may be that in England, and perhaps in Massachusetts, the point is differently settled; but it will be remembered, that according to the common law, no prisoner accused of a capital crime was allowed to exculpate himself by the testimony of *any* witness. Blackstone says, that the courts grew so heartily ashamed of a doctrine so unreasonable and oppressive, that a practice was gradually introduced of examining witnesses for the prisoner, but not upon oath, the consequence of which still was that the jury gave less credit to the prisonor's evidence than to that produced by the crown. At length by the statutes of 7 Wm. 3, and 1 Ann, all witnesses for the prisoner were to be examined upon oath, in like manner as the witnesses against him. Accomplices, in England, even after this change, might be examined for the crown, but not for the defendant. Although these statutes of 7 Wm. 3, and 1 Ann were never adopted in Kentucky, our courts, governed as they have been by the genius and spirit of our institutions, have never hesitated to admit witnesses to testify upon oath in behalf of the defendant, and as an accomplice jointly indicted could testify for the Commonwealth, in the same liberal spirit he was also held competent for the defendant, *when not jointly tried with him.* It is conceded on all hands, where there are separate indictments, that an accomplice is a competent witness for the defendant. Our courts have decided that his competency cannot depend upon the will of the attorney for the Commonwealth in drawing up a separate or joint indictment. These decisions have been rendered by Circuit Courts, it is true, as there has been no appeal in criminal cases until very recently, in Kentucky.

It is possible, though we know of no case, that there has not been perfect uniformity with all our Circuit Courts upon this point; but it was shown in the argument of this case that such had been the current of decisions, and Judge Kincheloe, when first deciding it, did it upon the authority of a decision of his predecessor. The State of Virginia has by statutory enactment provided "that no person who is not jointly tried with the defendant, shall be incompetent to testify in any prosecution by reason of interest in

the subject matter thereof." Greenleaf, in his Treatise on Evidence, § 379, says: "It is a settled rule of evidence, that a *particeps criminis* is not on that account an incompetent witness, so long as he remains not convicted and sentenced for an infamous crime. The admission of accomplices, as witnesses for the government, is justified by the necessity of the case. The usual course is to leave out of the indictment those who are to be called as witnesses; but it makes no difference as to the admissibility of an accomplice, whether he is indicted or not, *if he has not been put on his trial at the same time with his companions in crime. He is also a competent witness in their favor.*" Notwithstanding all this you undertake to decide that this ruling is so gross a perversion of Kentucky law, as in some degree to justify the indignation felt and expressed against Mr. Crittenden. We trust that your sense of justice will induce you to retract this harsh sentence.

In this connection, we are constrained to add that you have admitted a sentence, doubtless inadvertently, which if we understand its meaning, is as disgraceful to the columns of your Journal, as it is grossly false. You say, "Perhaps the counsel understood the court as well as they understood the inclination of the jury, and hence a ruling disgraceful, even to a court of *Kentucky Justice.*"

If by this the idea is intended to be conveyed that there was any understanding between the counsel and the court, or that the counsel knew any thing more of the inclination of the jury than could be ascertained by a legal interrogation, we pronounce the insinuation infamously false. But we cannot for a moment believe, that distant as you are from the scene of action, and ignorant, as you must be, of the character of those thus implicated, that you could yourselves have written the paragraph. From this consideration, we refrain from all comment upon the illiberal remark "that the ruling was disgraceful *even* to a court of *Kentucky Justice.*" We are sure that on reading over the whole paragraph, you will blush that it has polluted your pages.

You say that an unjustifiable use was made of the testimony of Robert J. Ward, Jr., thus illegally introduced; how, or in what way, you do not say, except by arguing that he was not worthy of the slightest credence, where he was not amply confirmed. You admit that it was fair

enough to urge, especially in a desperate case, that this witness, testifying under so strong a bias, is nevertheless the only one worthy of belief. In making this admission you yield the whole question, as to the unjustifiable use made of this testimony. It does seem to us, that it is among the strange and extraordinary perversities of human nature, that any properly constituted mind should come to such a conclusion, and that it should find a place in one of the most respectable Law Journals of the country. Let us look at the case as it really stood. The court admitted the testimony of young Ward, who stated clearly and distinctly that Butler struck first. He was before the jury, whose province it was to judge from his manner, his look, his tone of voice even, how far he was entitled to credit. It is true, as you say, that "he testified under the strongest temptation which can assail the integrity of a witness." We admit that in such a case, to entitle him to full credence, his statements ought to be corroborated. The consistency of his story, the filling up of chasms, which all could discern in the testimony of others, connected with his whole manner, in many cases, may amount to sufficient corroboration to carry conviction to the minds of an intelligent and honest jury. In this case, counsel had not to rely on this alone; Robert J. Ward, Sr., in his testimony, said, he "heard his wife scream; he run in, saw Matt. put his hand to his face and say, would you have me beaten like a dog. This called his attention to a blow on his face, it was swollen." This was immediately after the fatal occurrence. Mrs. Ward says: "When they returned I noticed the mark on Matt's cheek; it was red under the eye." George D. Prentice says: "Saw Matt. Ward five hours after the difficulty — my attention was called to his face and eye, which were reddened and slightly colored. I should not infer a severe blow, but one sufficient to cause injury." It thus appears that a blow had been struck. Dr. L. P. Yandell, who testifies affirmatively, and whose word no one can or would doubt, says: "Butler said, we were clinched — said Ward had called him a d—d liar, and raised his hand to strike him; then Butler struck — they clinched and he was immediately shot. Do not remember what Butler said, distinctly, about Ward raising his hand." This was a witness introduced by the prosecution, and the whole of this evidence is extracted from the report of the trial published by the Courier and Democrat in Kentucky, and is not taken from, what you

are pleased to term, the *ex parte report.* In addition to this, J. M. Barlow who has come in for a full share of public denunciation, says, Butler told him that Matt. Ward gave him the d—d lie, "and I hit him (or as he was a learned man, I suppose he said struck him) for it; and in the fuss Ward threw his right hand against my breast and shot me; the pistol stuck in my coat and I pulled it out."

Mr. and Mrs. Creushaw corroborate Barlow by saying that he told them, immediately after this affair, what Butler had said corresponding with the foregoing statement. He was at that time much excited against Matt. Ward. It thus appears that the statement of Robert J. Ward, Jr., was corroborated, first, by the fact of the evidence of the blow on the face; secondly, by Butler's own statement to Dr. Yandell that he struck first, a witness altogether unimpeachable, and introduced by the prosecution; and thirdly, by the testimony of Barlow, corroborated as it is, by the proof of his statements to the same effect, at the date of the occurrence. Besides all this, J. M. Allen, who lived in Yazoo city, Mississippi, and who was in Louisville at the time of the occurrence, and was sitting in the office of the Hydropathic institution, when Mr. Sturgus entered the door and said, run for a doctor, for Butler is shot and perhaps killed, stated, "that he passed on to the school-house; in the front yard there were twelve or fifteen boys. Witness asked how this happened." "Several of the boys spoke up at once, and said, Ward came there and cursed Butler, Butler struck him, and Ward shot Butler."

J. G. Gudgel, who lived in Missouri, was in company with Mr. Allen at the school-house, and inquired what had happened. "The answer given by five or six was, that Ward came to ask an explanation, Butler ordered him out of the house, Ward still asked for an explanation; Butler then struck him, as some said; others said Butler pushed him down, or partly down, and as he raised he fired; they all said Butler struck first." All this evidence, as we have before said, is extracted from the Cole report, published in Louisville. Now if from all the facts and circumstances thus detailed, an advocate for the accused had failed to urge before the jury, the truth of the statement of R. J. Ward, Jr., that Butler struck first, he would most certainly have failed in the discharge of a high and solemn duty.

We seriously ask if there is an advocate of any standing in the United States, who would come to the conclu-

sion, under this state of case, that an unjustifiable use was made of the testimony of R. J. Ward, Jr.? What if there was contradictory evidence? Did that lessen the obligation of an advocate to urge upon the jury testimony thus corroborated? One would judge from the tone of the article in your journal, that it was the duty of an honest and upright advocate himself, to *weigh* the testimony, and then to state to the jury in whose favor it preponderated. The well known principle, so universally settled as to have become a maxim of law, that the jury cannot in criminal, as in civil cases, *weigh* the evidence and decide according to its preponderance, seems to have been forgotten, and counsel is censured for not doing what a jury even would not be at liberty to do. Greenleaf, in his third volume of Evidence, § 29, after clearly defining the law on this point, adds, that "The oath administered to the jurors, according to common law, is in accordance with this distinction." After first condemning Mr. Crittenden for the unjustifiable use of young Ward's testimony, and then admitting that it may be fair enough, especially in a desperate case to urge that this witness was the only one *worthy of belief*, you add: "But the testimony of the scholars must still be disposed of; it would be a little too audacious, for even the most unscrupulous of the prisoner's counsel, to denounce them all as perjured, as they were the sons of some of the most respectable citizens of Louisville." No counsel in the case ever contended that R. J. Ward, Jr., was the only witness *worthy of belief*, and such a statement cannot be otherwise viewed than as evidence of the prejudice which dictated your whole article.

Mr. Crittenden, as he had a right to do, and as it was his *duty* as an advocate to do, commented upon the consistency of his whole statement, contending that it was the only testimony which brought order out of disorder; "the only consistent history of the events that transpired — natural in their course, and leading directly to the results that actually occurred." He does not say that he is the only witness *worthy of belief;* nor was there any disposition, as very illiberally insinuated above, "to denounce all the scholars as perjured." On the contrary, Mr. Crittenden emphatically declared his belief to the jury that these boys were "intelligent, and honest, and high-minded, and *incapable* of any intentional misrepresentation." You admit that in some respects their testimony was "undeni-

ably conflicting; hardly one of them attempted to give the whole conversation; they testified in regard to conversations only partly heard, and acts only partly seen." It was the duty of the counsel, however pure may have been the source from whence such testimony flowed, to make becoming and proper comments upon it; Mr. Crittenden therefore said, and properly said, "I may safely say that from beginning to end, no two of these witnesses have perfectly agreed; that their statements contained numerous discrepancies and contradictions; that the account of no one of them is probable and satisfactory, and that they all show, from their disjointed nature, they only contain portions and fragments of the facts that occurred."

He very properly alluded to the fact that all their sympathies were on the side of their teacher. If it was not the province of counsel to make such comments as these, it is not perceived what he *could* say, except to admit the guilt of the client. You say that "almost every boy who testified, distinctly asserted that when Ward entered the school-room, he had *his right hand in his pocket*, and gesticulated with the fingers of his left. They corroborate each other in this important fact, with remarkable unanimity," and that Robert J. Ward, Jr., distinctly asserted to the contrary. It was necessary, therefore, for counsel in the defence to comment upon this "important fact;" and the course which they felt it their duty to pursue, has called forth your most unqualified and bitterest denunciation.

This denunciation is based on what you call the atrocious attack of counsel on Sturgus, who you say was represented by them to be "moved by demoniac hatred towards the whole Ward family," to advise Butler to refuse the explanation, and then to instil into the minds of his pupils by artful "insinuation, and cunningly contrived observations, the belief that the fact they testified to was true, *he himself all the while knowing it to be false.*" However severe and improper the attack upon Sturgus may have been, the above is a false representation of its character. Counsel nowhere said he was moved by "demoniac hatred to the *whole* Ward family." In a different connection, he was spoken of as the enemy of Matt. Ward. In this connection, when speaking of his administering a whipping to the boy, on a former occasion, the question is asked, "If it is not probable, that instigated by *his enmity* towards the Wards, he advised Butler to refuse all explanation and in-

vestigation?" He nowhere charges him with making "insinuations and cunningly contrived observations, *he all the while knowing them to be false.*"

We have no disposition to injure the character, or even wound the feelings of Mr. Sturgus. He may be as upright and as pure a man as any in our midst, but we ask if he did not stand in a relation to this case, which fully justified the counsel in bringing his name before the jury, although he did not actually testify in the case. It was well known that not one word was said on the examining trial by any witness as to the manner in which Matt. Ward held his right hand. The evidence on that trial is now before us, as reported in the Courier of Nov. 4th, 1853, and this "important fact" is wholly omitted. It is equally well known that Mr. Sturgus gave his testimony on that trial. He was the assistant of Mr. Butler, doubtless much attached to him, and every feeling of his heart must naturally, and necessarily have been on his side.

"These boys, from eleven to eighteen years of age, since the occurrence of the principal fact, had been the scholars, and under the tuition and training of Mr. Sturgus." Every circumstance, by which they were surrounded, was calculated to give their minds a bias against the accused, and on the side of their teacher. Mr. Sturgus went to the place of trial with these boys; he was actually sworn as a witness for the prosecution, and never called up and examined. Is it reasonable to suppose that after this event, when these boys who were to be witnesses on the final trial, and some of whom had testified on the examining trial, were daily with Mr. Sturgus, for a period of six months, that the facts attending the transaction were never talked about? Is any thing more natural than that this event should have been the subject of frequent and repeated conversations? Without imputing dishonesty to either the scholars or Sturgus, was it not the duty of an advocate to array these facts and circumstances; and alluding to the enmity of Sturgus to Matt. Ward, to call upon the jury to put the facts together, and draw their own inferences? When it had been made manifest by the evidence of Allen and Gudgel that several of the boys of the school, immediately after the occurrence, said that "Butler struck Ward, and he shot him," had not the most scrupulous counsel who ever appeared in defence of one charged with crime, the right to argue that some extraneous influence had

operated on the recollection of the boys? This theory does not necessarily involve the turpitude of either the witnesses who testify, or of the person who may exert the extraneous influence. Sturgus may honestly "by a word thrown in, or a statement repeated," have exercised "influence over the recollection of the boys." To make out a case against Mr. Crittenden, your article has to add, to what he did say, "that he, Sturgus, himself all the while knew his statement to be false."

The following quotation from your Journal, Vol. 9, p. 243, is not an inapt illustration of the view above presented. "It is a matter of curious observation, how any event, which is shared, or witnessed merely, in a state of hurry and excitement, presents different or even opposite aspects to the memory, and *how a bias, from some almost or wholly imperceptible cause*, converts spectators who are without interest, and above suspicion, into partisan witnesses. Such is almost every case of litigated collision, by land or water, in which it is usual to find both bystanders and passengers differing, not only on the looser points of sobriety and speed, but on such matters of direct opposition, as on which side of the road or river each carriage or vessel was proceeding, and even on which side of a carriage or vessel, a blow was struck."

In the case of *The Propeller Genesee Chief* v. *Fitzhugh, &c.*, 12 Howard, 460, Chief Justice Taney, in speaking of the evidence in a case of collision, says: "And as it almost invariably happens, in cases of this kind, there is a great deal of contradictory testimony — the men belonging to one boat differing, for the most part, from those in the other." Why is this? Witnesses "without interest and above suspicion," are found arrayed on the side of the boat they happen to be on. Would it be unprofessional for an advocate to speculate on the causes which so universally produce this state of case? To allude to, and bring before the jury the natural influence, which the commander of the vessel would exert, "by a word properly thrown in, or a statement repeated," over the recollection of his passengers? Is it more improper to draw the same kind of inference as to the influence which Sturgus might have exerted over a parcel of boys, under his tuition and training, for six months after the occurrence? After the facts are fairly given, Mr. Crittenden tells the jury, that they are "to judge themselves if the probabilities, in regard to the character of the

testimony of these boys, are not all in favor of the assumption he had made."

The writer of the article in your journal seems to lose sight wholly of the influence which the relation between counsel and client is always calculated to exert. In the volume of your journal from which we have already quoted, it is very justly and appropriately said, that "The statement presented to counsel is, almost always, such as to induce a strong belief in the justice of the cause, and to enlist his feelings powerfully in its success. To one thus prepossessed, who can wonder that in the animation of the contest the first impression is deepened; and as the little chapter of life, with all its living interest, opens around him, his client's case becomes part of his own being; that his belief in its justice insensibly but inseparably blends with his natural desire to succeed; and that he hears all the arguments, and regards all the testimony against it, with the surprise, dislike, and incredulity of inveterate opinion, sharpened by zeal."

If Mr. Crittenden had in the heat and animation of the contest, even overstepped the strict bounds of professional propriety in his allusion to Sturgus, is there no extenuation growing out of the reiterated statements of his client as to Sturgus's feelings? When counsel for the prosecution alluded to the fact of William Ward not being examined, and said, "but they did not introduce him, because they dare not, as he would doubtless have proved the guilty intention, — that as much is often revealed by what a party withholds, as what is advanced," was there more impropriety in alluding to the fact that Sturgus was sworn as a witness, and yet was not examined? Was there any fact with regard to the position occupied by Sturgus, untruly presented to the jury, for them to draw improper inferences from? They certainly had the right to infer that he talked to his scholars about the killing, and about the circumstances attending it; the fact that they had been under him for six months, was known and conceded; the prosecution had introduced and had him sworn, and for reasons best known to themselves, had failed to examine him; the statement that he was the enemy of Matt. Ward, had gone before the jury as evidence; he was present, and could have disproved it if untrue, and could also have shown whether he conversed with the boys about their evidence, or not; and yet for alluding to these known and

admitted facts, and asking the jury to draw their own inferences, it is blazoned forth to the world as an *atrocious attack* on his character.

When Erskine, on the trial of Baillie, becoming heated with his subject, and growing personal on Lord Sandwich, was stopped by Lord Mansfield by the remark that Lord Sandwich was not before the court, he replied: "I know that he is not formally before the court, but for that very reason *I will bring him before the court.* He has placed these men in the front of the battle, in hopes to escape under their shelter, but I will not join in battle with them. I will drag him to light, who is the dark mover behind this scene of iniquity." Mr. Crittenden did not go as far as this, and describe Sturgus as the "*dark mover behind this scene of iniquity.*" He philosophized only on the influence he could exert "by a word thrown in, or a statement repeated." It is not a necessary conclusion that there was any moral depravity in his doing this; he may honestly have exerted such influence, under a full conviction that he was in no way departing from the truth of the case, and thrown in words, and repeated statements, which he believed to be true; yet for simply discharging his duty, as we conceive it to have been, you conclude that all the past services and future expectations of Mr. Crittenden are not sufficient to avert the just indignation of the public, which the perversion of great powers to an unworthy purpose is sure to excite; and this sentence of condemnation is found in a law journal hitherto respectable, and has thus the implied indorsement of able and learned lawyers. We cannot doubt that your sense of justice will lead you to review, and correct also, this iniquitous condemnation.

The judge who presided on this trial comes in also for a full share of your condemnation and reprobation. A man of a purer or more unsullied character has never adorned the bench in any country. In saying this, we but speak the universal public sentiment of the whole district where he has presided. The upright and high-minded attorney for the Commonwealth, in this case, (Mr. Allen,) has voluntarily come forward to defend him from the rude and violent attacks of one of the Louisville papers.

You assume that it was the duty of the judge to give a charge to the jury, and then contrast what was said with a charge delivered by the excellent Chief Justice of your own Supreme Court, occupying more than two hours.

When you learn that a judge is not allowed to charge a jury, either in a *civil or criminal case*, in Kentucky, you will doubtless be ready to acknowledge the gross, and we may add "atrocious" injustice you have done Judge Kincheloe.

In the case of *Howard, &c.*, v. *Coke, &c.*, 7 Ben Monroe, Kentucky Reports, p. 658, the question came up of the right of the judge to charge in a *civil* suit. The court say: "We do not deem it necessary to decide whether the charge, in this instance, would exceed the bounds of propriety, if a charge from the bench to the jury, on the evidence, be authorized by law. Such a right exists in England and in some of our sister States. It has never, however, been exercised in this State, and if the non-existence of a right is at all inferable from the fact that it has never been assumed or used, the custom in this State on this subject must be deemed conclusive against the existence of the right. By general consent and common understanding of what the law is, a different usage has prevailed. In *civil cases* the law is decided by the judge, the facts of the case being left exclusively to the decision of the jury, unbiassed by the influence of the court, or any judicial suggestion." . . . . . "As a mere question of expediency, much may be urged on both sides. In this aspect of the question, however, it is one for legislative and not judicial action." "We have come to the conclusion the power does not exist in the judge, and cannot be exercised by him to any extent." It will be observed from the foregoing extracts, that the court has carefully confined the right of the judge to decide even the law to *civil cases.*

In the year 1821, charges were made against the official conduct of Benjamin Mills, one of the most able and learned judges which Kentucky can boast. He was arraigned before the legislature, and very ably and eloquently defended by Hon. Henry Clay. One of the charges against him was, that he had *charged* the jury on the law in a criminal case. He was acquitted by a vote of fifty-two to thirty-four, but immediately on his acquittal, Mr. Clark read and laid on the table four resolutions, the last of which was, "That in criminal cases the jury have a right to judge as well of the law as the fact." House Journal, p. 227. On this resolution the yeas and nays were taken, and the vote stood, for the resolution, sixty-eight, against it, seventeen. Sixteen of those who voted in the negative had it

entered on the journal, "that although they voted against the adoption of this resolution, they believe the law to be as declared in said resolution." Pp. 233, 236. The resolution was also passed by a large majority in the Senate, with a preamble attached, that the object of the legislature was "to preserve inviolate certain fundamental principles." Since that period, no judge in Kentucky has ever attempted to charge a jury in a criminal case, either upon the law or facts, in the sense in which a charge is here understood. Instructions upon points of law have been asked by counsel, and are given, modified, or refused by the court. Such is the law at present, under the new criminal code of Kentucky, section 226. "The court shall then, on the *motion* of either party, instruct the jury on the law applicable to the case, which shall always be given in writing."

From this brief view of what is considered the right and duty of a judge in Kentucky, you cannot fail to perceive how gross and outrageous has been the injustice done to one of the purest judges and best men who ever adorned a judicial station.

There are many other portions of your article, which, perhaps, demand a passing notice, but we have already extended our remarks too far. The sneers upon Kentucky justice we cannot believe emanate from so respectable a source as we have been taught to believe you to be. Before any impartial tribunal, we would most willingly compare Kentucky justice with that of your "own more favored State." There may be, and doubtless are, many cases where the guilty have escaped, in Kentucky; but do you pretend that you have had no such cases in Massachusetts? But Kentucky needs no defence. If "the code of honor," as you term it, has in any degree imparted an improper hue to the pure fountain of justice, with us, may not an equally deleterious influence have mingled its noxious element with you? But however polluted may be the stream of "*Kentucky justice*," we would blush to tarnish the character of any son of your renowned Commonwealth, who had sustained an unsullied and spotless integrity through a long life, and "against whom no word of reproach had ever been uttered," until acting in obedience to his own conscientious conviction of a high duty, he necessarily encountered the strong current of popular prejudice. It seems to us that it would require but a small degree of charity, when it is well known that the report of this cele-

brated case does not pretend to give either the exact words of witnesses, or of the arguments of counsel, to have been more cautious in the harsh denunciations in which you so freely indulge. If every word which has been published has not been in exact accordance with your views of professional propriety, has it never been your lot to meet with an advocate of ardent temperament and high honor, whose understanding has been occasionally the dupe of his other faculties, and, to use the language of an Irish barrister, "whose judgment in the hurry and fervor of argumentation could not escape the snares his ingenuity had weaved for others?" Have you never seen any one of the bright intellects of your own State engaged in a cause in which his feelings had become enlisted, not so much on account of his professional engagement as from the sacred ties of friendship, and as incident after incident became portrayed upon the living canvas, gradually becoming more and more interested, until the views and feelings of his client insensibly became a part of his own being, and like the celebrated Plunkett, "from the intense ardor with which he followed up each successive advantage, he finally worked himself into a conviction that all the merits of the case were on his side?" If so, you will no longer condemn such a man as John J. Crittenden upon unfounded charges of professional misconduct.

NOTES TO LEADING CRIMINAL CASES.

Commonwealth *v.* Rogers.[1]

Insanity — Delusion — Medical Testimony.

A party indicted is not entitled to an acquittal on the ground of insanity, if, at the time of the alleged offence, he had capacity and reason sufficient to enable him to distinguish between right and wrong, and understood the nature, character and consequences of his act, and had mental powers sufficient to apply that knowledge to his own case.

Where the delusion of a party is such, that he has a real and firm belief of the existence of a fact which is wholly imaginary, and under that insane belief he does an act which would be justifiable if such fact existed, he is not responsible for such act. Nor is a party responsible for an act done under an uncontrollable impulse, which is the result of mental disease.

Where professional men, who have long been conversant with insanity in its various forms, and have had the superintendence of insane persons, attend the trial of a party who is indicted for a crime, and whose de-

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[1] 7 Met. 500.

fence is insanity, and hear the testimony in the case, their opinions, on the question whether the party was insane, are competent evidence, though they never personally examined the party.

A jury is authorized to find that a party, who is indicted, was insane at the time of the alleged offence, if the preponderance of the evidence is in favor of his insanity.

[1] The defendant, a convict in the State Prison, at Charlestown, Mass., was indicted for the wilful murder of Charles Lincoln, the warden of the prison, on the 15th day of June, A. D. 1843, by stabbing him with a shoe-knife. The fact of killing was clearly proved, and the sole defence was insanity. The homicide took place on Thursday, and the evidence tended to show that, commencing on Monday night previous, and continuing with increasing aggravations up to some period subsequent to the warden's death, the prisoner was laboring under some powerful hallucination; that he was at times in great distress and apprehension; that he declared he heard the voices of his fellow-prisoners, confined in distant parts of the prison, and also some of the officers speaking to him, and threatening him with danger; telling him that poisonous substances were mingled in his food; that a fatal or dangerous game was playing upon him, which he could not long survive; that the warden was going to take him up to the old prison, shut him up, and keep him there till he was carried out feet first; that he expressed his fears and apprehensions at various times to different persons, during the three days prior to the homicide, and particularly and frequently stated that the warden was going to shut him up, and that if he did he should not live three days; he should be carried out feet first; and other statements of a like kind. *His predominant fear seemed to be that he was to be shut up by the warden, and the consequence would be that he should suffer instant death.* On the afternoon of the homicide the prisoner saw the warden entering the shop where he was at work, and under the influence of his delusion, which then appeared to be at its crisis, and in full possession of his mind, he probably imagined the time had come for his imprisonment in the old prison, and his consequent death; impelled by a fear of his impending danger, he rushed upon the object of his fear, and averted his own death, as he supposed, by taking the life of the warden.

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[1] The following statement of the case is substituted for the reporter's abstract.

Several medical gentlemen, and superintendents of insane asylums, some of whom had, and others had not, made a personal examination of the prisoner, testified that in their opinion he was unquestionably insane.

The prisoner's counsel (George Bemis, Esq. and George Tyler Bigelow, Esq., now Mr. Justice Bigelow, of the Supreme Judicial Court of Massachusetts,) claimed upon this and the other evidence in the case, that if the jury were satisfied that *the prisoner, when he committed the homicide, was laboring under a delusion which overpowered his will, and deprived him of self-control, and the act was connected with that delusion, he was entitled to an acquittal.*

How entirely that position was sustained by the facts and the law, the verdict of acquittal and the instruction of the court to the jury furnish sufficient answer. The charge of the court was thus delivered by

Shaw, C. J. — In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.

But these are extremes easily distinguished, and not to be mistaken. The difficulty lies between these extremes, in the cases of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning and judging, or so perverted by insane delusion, as to act under false impressions and influences. In these cases, the rule of law, as we understand it, is this: A man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong,[1] as to the particular act he is then doing; a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and

[1] See opinion of the judges given to the House of Lords, 1 Car. & Kirw 130-136; Shelford on Lunatics, c. 12, § 1; *Dew* v. *Clark*, 3 Addams, 79; *Regina* v. *Oxford*, 9 Car. & P. 525; *Rex* v. *Offord*, 5 Car. & P. 168; *Regina* v. *Higginson*, 1 Car. & Kirw. 129; 1 Russell on Crimes, c. 1.

right, injurious to others, and a violation of the dictates of duty.

On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act, and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that, if he does the act, he will do wrong and receive punishment; such partial insanity is not sufficient to exempt him from responsibility for criminal acts.

If, then, it is proved, to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree, that for the time being it overwhelmed the reason, conscience, and judgment, and whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse. If so, then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it.

The character of the mental disease, relied upon to excuse the accused in this case, is partial insanity, consisting of melancholy, accompanied by delusion. The conduct may be in many respects regular, the mind acute, and the conduct apparently governed by rules of propriety, and at the same time there may be insane delusion, by which the mind is perverted. The most common of these cases is that of *monomania*, when the mind broods over *one idea* and cannot be reasoned out of it. This may operate as an excuse for a criminal act in one of two modes. 1. Either the delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act; as where the belief is, that the party killed had an immediate design upon his life, and under that belief the insane man kills in supposed self-defence. A common instance is where he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws, and the laws of nature. 2. Or this state of delusion indicates, to an experienced person, that the mind is in a diseased state; that the known tendency of that diseased state of the mind is to break out into sudden paroxysms of violence,

venting itself in homicide or other violent acts towards friend or foe indiscriminately; so that although there were no previous indications of violence, yet the subsequent act, connecting itself with the previous symptoms and indications, will enable an experienced person to say that the outbreak was of such a character, that for the time being it must have overborne memory and reason; that the act was the result of the disease, and not of a mind capable of choosing; in short, that it was the result of uncontrollable impulse, and not of a person acted upon by motives, and governed by the will.

The questions, then, in the present case, will be these: 1. Was there such a delusion and hallucination? 2. Did the accused act under a false but sincere belief that the warden had a design to shut him up, and, under that pretext, destroy his life; and did he take this means to prevent it? 3. Are the facts of such a character, taken in connection with the opinions of the professional witnesses, as to induce the jury to believe that the accused had been laboring for several days under monomania, attended with delusion; and did this indicate such a diseased state of the mind, that the act of killing the warden was to be considered as an outbreak or paroxysm of disease, which, for the time being, overwhelmed and superseded reason and judgment, so that the accused was not an accountable agent?

If such was the case, the accused is entitled to an acquittal; otherwise, as the evidence proves beyond all doubt the fact of killing, without provocation, by the use of a deadly weapon, and attended with circumstances of violence, cruelty, and barbarity, he must undoubtedly be convicted of wilful murder.

The ordinary presumption is, that a person is of sound mind, until the contrary appears; and in order to shield one from criminal responsibility, the presumption must be rebutted by proof of the contrary, satisfactory to the jury. Such proof may arise, either out of the evidence offered by the prosecutor to establish the case against the accused, or from distinct evidence, offered on his part; in either case, it must be sufficient to establish the fact of insanity; otherwise, the presumption will stand.

The opinions of professional men on a question of this description are competent evidence, and in many cases are entitled to great consideration and respect. The rule of law, on which this proof of the opinion of witnesses, who

know nothing of the actual facts of the case, is founded, is not peculiar to medical testimony, but is a general rule, applicable to all cases, where the question is one depending on skill and science in any particular department. In general, it is the opinion of the jury which is to govern, and this is to be formed upon the proof of facts laid before them. But some questions lie beyond the scope of the observation and experience of men in general, but are quite within the observation and experience of those whose peculiar pursuits and profession have brought that class of facts frequently and habitually under their consideration. Shipmasters and seamen have peculiar means of acquiring knowledge and experience in whatever relates to seamanship and nautical skill. When, therefore, a question arises in a court of justice upon that subject, and certain facts are proved by other witnesses, a shipmaster may be asked his opinion as to the character of such facts. The same is true in regard to any question of science; because persons conversant with such science have peculiar means, from a larger and more exact observation, and long experience in such department of science, of drawing correct inferences from certain facts, either observed by themselves or testified to by other witnesses. A familiar instance of the application of this principle occurs very often in cases of homicide, when, upon certain facts being testified to by other witnesses, medical persons are asked, whether in their opinion a particular wound described would be an adequate cause, or whether such wound was, in their opinion, the actual cause of the death, in the particular case. Such question is commonly asked without objection; and the judicial proof of the fact of killing often depends wholly or mainly upon such testing of opinion. It is upon this ground, that the opinion of witnesses, who have long been conversant with insanity in its various forms, and who have had the care and superintendence of insane persons, are received as competent evidence, even though they have not had opportunity to examine the particular patient, and observe the symptoms and indications of disease, at the time of its supposed existence. It is designed to aid the judgment of the jury, in regard to the influence and effect of certain facts, which lie out of the observation and experience of persons in general. And such opinions, when they come from persons of great experience, and in whose correctness and sobriety of judgment just confidence can be

had, are of great weight, and deserve the respectful consideration of a jury. But the opinion of a medical man of small experience, or of one who has crude and visionary notions, or who has some favorite theory to support, is entitled to very little consideration. The value of such testimony will depend mainly upon the experience, fidelity and impartiality of the witness who gives it.

One caution, in regard to this point, it is proper to give. Even where the medical or other professional witnesses have attended the whole trial, and heard the testimony of the other witnesses, as to the facts and circumstances of the case, they are not to judge of the credit of the witnesses, or of the truth of the facts testified by others. It is for the jury to decide whether such facts are satisfactorily proved. And the proper question to be put to the professional witnesses is this: If the symptoms and indications testified to by other witnesses are proved, and if the jury are satisfied of the truth of them, whether, in their opinion, the party was insane, and what was the nature and character of that insanity; what state of mind did they indicate; and what they would expect would be the conduct of such a person, in any supposed circumstances. See 1 M. & Rob. 75.

In this interesting case three points are involved, which it is designed to make the subject of this note.

First. — What is such insanity as exempts from punishment.

Second. — Of the evidence competent on the issue of insanity, and especially of the *opinions* of witnesses on that subject.

Third. — The degree of proof sufficient to authorize a jury to find insanity.

Of each of these in their order. And

First. — What insanity is an excuse for crime.

It is foreign to the purpose of this note to enter into any general discussion of this terrible malady, its subtle and mysterious nature, its various causes, its growth and progress, or its manifold symptoms and manifestations. Such an examination more properly belongs to a treatise on medical jurisprudence, or to an independent and separate volume on Insanity itself. Neither is it our design to examine the correctness or propriety of the *result* of any of the interesting and important trials on record, where the defence of insanity has been set up. Juries may, and doubtless have, erred on the one side and the other, in their application of the just and true principles of the common law to individual cases as they came before them. And the apparent inconsistency of some of their recorded verdicts, essentially increases the painful uncertainty attending the administration of this perplexing branch of criminal law. But our present limits do not allow us to dwell upon either of these aspects of the subject, but simply to present a summary of the *principles of law* by which insanity is to be tested, as we can gather them from the language of courts and judges to whom has fallen the duty of expounding and explaining them.

Every reader conversant with the course of English trials, cannot fail to have observed that, notwithstanding all the fluctuations and inconsistencies of opinion among the most eminent and learned judges, their vague generalities and loose expressions, a gradual advance in accuracy, clearness, and *reason* in the law of insanity is perceptible, as laid down in modern trials, when compared with the doctrines of Lord Coke, Hale, Fitzherbert, and others, of early time. One of the most eminent of those early writers declares that "such a person as laboring under melancholy distempers, hath yet ordinarily as great understanding as ordinarily a child of fourteen hath, is such a person as may be guilty of treason or felony." 1 Hale, P. C. 30.

And even as late as 1723, we find this language used by Mr. Justice Tracy, on the trial of Arnold for shooting at Lord Onslow:

"It is not," said he, "every kind of frantic humor, or something unaccountable in a man's actions, that points him out to be such a madman as is exempted from punishment; it must be a man that is *totally* deprived of his understanding and memory, and doth not know what he is doing no more than an infant, *than a brute*, or wild beast; such a one is never the object of punishment." 8 Hargr. St. Tr. 322; 16 Ib. 764.

True it is, such an one is never the object of punishment, but if the converse is to be held true, that all others are amenable, then *absolute idiocy* is the only shield against the arm of the criminal law.

Doctrines like these could hardly be expected long to withstand the advance of scientific knowledge, and the diffusion of more accurate information concerning the existence and manifestations of a diseased and disordered mind.

The first advance from the old doctrines was, that if the accused had *so far* lost the use of his understanding as not to know right from wrong, he was not responsible. This test was afterwards so far modified, as to be applied to the *precise act* for which the prisoner was arraigned, and it has now long been the rule usually applied in the English courts, that if the accused has reason sufficient to distinguish right from wrong, in reference to his contemplated act, or, to speak more accurately, *reason sufficient to know that the act was contrary to law*, he is amenable to justice. And this test has been adhered to, with some tenacity, by the English judges. Several instances of their reported language will be found cited in this note. Lord Brougham, in the memorable debate in the House of Lords, occasioned by the acquittal of McNaughten, for murder, in 1843, thus decidedly expressed himself:

"If the perpetrator *knew what he was doing*, if he had taken the precaution to accomplish his purpose; if he knew, at the time of doing the desperate act, that it was forbidden by the law, that was *his* test of sanity; he cared not what judge gave another test; he should go to his grave in the belief that it was the real, sound, and consistent test." Sir James Mansfield, [not Lord Mansfield,] in *Bellingham's case*, 5 Carr. & Payne, 169, note, (1812,) applied this test in its most general form to a prisoner indicted for murder. "In order to support such a defence," said he, "it ought to be proved by the most distinct and unquestionable evidence, *that the prisoner was incapable of judging between right and wrong;* in fact, it must be proved beyond all doubt that at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature; *and that there was no other proof of insanity which would excuse murder or any other crime;* that, in the species of madness called 'lunacy, where persons are subject to temporary paroxysms, in which they are guilty of acts of extravagance, such persons committing crimes when they are not affected by the malady,

would be, to all intents and purposes, amenable to justice; and that so long as they could distinguish good from evil, they would be answerable for their conduct; and that in the species of insanity in which the patient fancies the existence of injury, and seeks an opportunity of gratifying revenge by some hostile act, *if such a person is capable in other respects of distinguishing right from wrong*, there would be no excuse for any act of atrocity which he might commit under this description of derangement." But the principles here advanced are so shocking, so contrary to one's moral sense, that it is not strange they should have been subsequently disapproved, even by Mansfield's successors.

Yet such a deep impression had the old authorities made upon the judicial mind of England, that we find Lord Lyndhurst, in 1831, expressly approving of the doctrines in *Bellingham's case*, although he furnished a much milder test to the jury in the case then before him. *Rex* v. *Offord*, 5 Carr. & Payne, 168. The prisoner was there indicted for murder. His defence was insanity. It appeared that he labored under the notion that the inhabitants of Hadleigh, and especially the deceased, were continually issuing warrants against his life, and he would frequently, under the same notion, abuse persons whom he met in the street, and with whom he had no dealings of any kind. In his pocket was found a list of conspirators against his life; also another paper, headed "This is the beginning of an attempt against my life." The Chief Baron told the jury that they must be satisfied, before they could acquit the prisoner on the ground of insanity, that he did not know what the effect of his act would be, if fatal, with reference to the crime of murder; and that the question was, whether he knew he was committing an offence against the laws of God and nature.

Under this evidence and these instructions the prisoner was acquitted, and with apparent good reason, for the delusion in that case was the same as in our leading case of *Commonwealth* v. *Rogers*, and the cases are in their facts and results very similar. The jury acted on the sound principle in *Offord's case*, although it does not seem to have been intimated to them from the bench. How much clearer and more satisfactory a guide was given to the jury for their examination of this delicate, subtle, and mysterious subject, in *Rogers'* case than in *Offord's*. So great was the advance in correct understanding of the law of insanity in the short space of twelve years.

Bowler's case, before Justice Le Blanc, in 1811, furnishes another painful illustration of the application of this loose test of legal insanity. The court there told the jury "it was for them to determine whether the prisoner, when he committed the offence, *was capable of distinguishing between right and wrong*, or under the influence of any illusion in respect to the prosecutor, which rendered his mind at the moment insensible of the nature of the act he was about to commit; since in that case, he would not be legally responsible for his conduct. On the other hand, provided, when he committed the offence, he was capable of distinguishing right from wrong, and not under the influence of such an illusion as disabled him from discovering that he was doing a wrong act, he would be answerable to the justice of the country, and guilty in the eye of the law." *Lord Ferrers' case*, before the House of Lords, in 19 How. St. T. 886, adopts the same test as *Bowler's case*.

The power of distinguishing right from wrong was again made the test of insanity, in *Regina* v. *Higginson*, 1 Car. & Kir. 129, (1843,) before Maule, J., who said to the jury:—"If you are satisfied that the prisoner, at the time of committing the offence, was so insane *that he did not know right from wrong*, he should be acquitted on that ground. But if you think he did know right from wrong, he is responsible for his acts, although of weak intellect."

TINDAL, C. J., uses similar language in *Regina* v. *Vaughan*, 1 Cox, C. C. 80, (1844,) where he informed the jury that "it was not mere eccentricity or singularity of manner, that will suffice to establish the plea of insanity; it must be shown that the prisoner had no competent use of his understanding, *so as to know that he was doing a wrong thing in the particular act in question.*" This is much better than the preceding, since it is confined to the act in question. Lord DENMAN, at the trial of Oxford for shooting at the queen, in 1841, said: "If you think that the prisoner was, at the time, laboring under any delusion which prevented him from judging of the effects of the act he had committed, you cannot find him guilty. But, if, though laboring under a delusion, he fired the loaded pistols at the queen, knowing the possible result, though forced to the act by his morbid love of notoriety, he is responsible, and liable to punishment."

So in the more recent case of *Regina* v. *Stokes*, 3 Car. & Kir. 185, (1848,) ROLFE, B., told the jury that "every man is held responsible for his acts by the law of his country, *if he can discern right from wrong*. This subject was, a few years ago, carefully considered by all the judges, and the law is clear upon the subject. It is true that learned speculators, in their writings, have laid it down, that men with a consciousness that they were doing wrong, were irresistibly impelled to commit some unlawful act. But who enabled them to dive into the human heart, and see the real motive that prompted the commission of such deeds. It has been urged that no motive has been shown for the commission of this crime; but it is a dangerous ground to take to say that a man must be insane, because men fail to discern the motive for his act." See also *Regina* v. *Layton*, 4 Cox, C. C. 149, (1849,) to the same effect.

So in *Regina* v. *Allnut*, before the same eminent Judge in 1848, a boy twelve years of age, was convicted of poisoning his grandfather under circumstances, showing great contrivance and deliberation. The defence was that the act was done under an irresistible impulse, which amounted to insanity. The jury were told: "The witnesses called for the defence described the prisoner as acting from uncontrollable impulse, and they made other statements, of the value of which it would be for the jury to decide; but he must say that it was his opinion that such evidence ought to be scanned by juries with very great jealousy and suspicion, because it might tend to perfect justification of every crime that was committed. What was the meaning of not being able to resist moral influence? Every crime was committed under an influence of such a description, and the object of the law was to compel persons to control these influences; and if it was made an excuse for a person who had committed a crime, that he had been goaded to it by some impulse, which medical men might choose to say he could not control, he must observe that such a doctrine would be fraught with very great danger to society."

And PARKE, Baron, seems to have had this case in his mind in the subsequent case of *Regina* v. *Barton*, 3 Cox, C. C. 275, (1848,) where the prisoner was indicted for the murder of his wife by cutting her throat with a razor. The distinguished Judge told the jury: "There was but one question for their consideration, viz., whether at the time the prisoner inflicted the wounds which caused the death of his wife, he was in a state of mind to be made responsible to the law for her murder. That would depend upon the question whether he, at the time, knew the nature and character of the deed he was committing, and if so, *whether he knew he was doing wrong in so acting*. This mode of dealing with the defence of insanity had not, he was aware, the concurrence of medical men; but he must, nevertheless, express his

decided concurrence with Mr. Baron ROLFE's views of such cases; that learned judge having expressed his opinion to be that the excuse of an irresistible impulse, co-existing with the full possession of reasoning powers, might be urged in justification of every crime known to the law; for every man might be said, and truly, not to commit any crime except under influence of some irresistible impulse. *Something more than this was necessary to justify an acquittal on the ground of insanity*, and it would be therefore for the jury to say whether, taking into consideration all that the surgeon had said, which was entitled to great weight, the impulse under which the prisoner had committed this deed was one which altogether deprived him of knowledge that he was doing wrong.

So in *Regina* v. *Pate*, before Baron ALDERSON, in 1850, for an assault upon the queen, the species of insanity relied upon was, that of an uncontrollable impulse driving the prisoner on against his will, to commit the offence. The medical gentlemen expressed a decided opinion that the prisoner was insane and not responsible, but the learned judge said, in summing up: "It is not because a man is insane that he is unpunishable; and I must say, that upon this point there exists a very grievous delusion in the minds of medical men. The only insanity which excuses a man for his acts, is that species of delusion, which conduced to, and drove him to commit the act alleged against him. The jury ought to have clear proof of a formed disease of the mind, a disease existing before the act was committed, and which made the accused *incapable of knowing at the time that it was a wrong act for him to do.* The law does not acknowledge the doctrine of an uncontrollable impulse, if the person was aware it was a wrong act he was about to commit. A man might say he picked a pocket from some uncontrollable impulse, and in that case the law would have an uncontrollable impulse to punish him for it. The question you have to decide is, Are you satisfied that at the time he was suffering from a disease of the mind which rendered him incapable of judging whether the act he committed was a right or wrong act? If you are not satisfied of this fact, you must say that he is guilty!"

The English formula, already so often repeated, was applied in *State* v. *Spencer*, 1 Zabriskie, 196, (1846,) where C. J. HORNBLOWER said to the jury: "The simple question for you, is whether the accused at the time of doing the act was conscious that it was an act he ought not to do. If he was conscious of this, he cannot be excused on the score of insanity, he is amenable to the law."

The same test of legal responsibility was deliberately pronounced by the judges of England, after great and anxious deliberation, upon questions put to them by the house of lords, after the trial of *McNaughten*, 10 Clark & Finnelly, 200, one of the most striking and important cases concerning insanity on record.

"The first question was: 'What is the law respecting alleged crimes committed by persons afflicted with insane delusion, in respect to one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?' To which the judges answered, assuming that such inquiries are confined to those persons who labor under such partial delusions only, and are not in other respects insane, 'we are of opinion, that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to

the nature of the crime committed, *if he knew at the time of committing such crime, that he was acting contrary to law*, which expression we understand, to mean the law of the land.' The second inquiry was: 'What are the proper questions to be submitted to the jury, where a person alleged to be afflicted with insane delusion, respecting one or more particular subjects or persons is charged with the commission of a crime, (murder, for example,) and insanity is set up as a defence?' And, thirdly: 'In what terms ought the questions to be left to the jury as to the prisoner's state of mind at the time when the act was committed?' To both of these interrogatories it was answered that the jury ought to be told in all cases 'that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity it must be clearly proved, that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, *that he did not know that he was doing that which is wrong*.' The mode of putting the latter part of the question to the jury on these occasions, has generally been, whether the accused at the time of doing the act knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not so accurate when put generally, and in the abstract, as when put with reference to the party's knowledge of right and wrong, in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof, that he does know it. If the accused was conscious that the act was one which he ought not to do, and if the act was at the same time contrary to the law of the land, he is punishable; *and the usual course, therefore, has been, to leave the question to the jury; whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong;* and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require."

This subject was much discussed in *Freeman* v. *The People*, 4 Denio, 29, (1847.) The rule of *McNaughten's case* was there cited with approbation, especial care being taken to confine the inquiry to the person's capacity of distinguishing right from wrong as to the particular act charged; for while a person might have a very just perception of the moral qualities of most actions, he might at the same time be as to some particular act absolutely insane, and consequently incapable as to *that* of judging accurately between right and wrong. And we see not why the converse may not be equally true, viz.: that a person may be generally insane, and be incapable of distinguishing right from wrong in a majority of his actions, and yet retain clear perceptions of some of his duties, and obligations, and realize that a certain specified violation thereof, should render him amenable to punishment. It was, therefore, denied that sanity, and a *general* capacity to distinguish between right and wrong were convertible terms, and this we understand to be the rule of the modern English authorities, meaning by *right* and *wrong* as used in the foregoing cases, not right or wrong in a moral sense purely, but rather in a legal one. Lord BROUGHAM, in the debate on *McNaughten's case* declared, that "Knowing right from wrong; knowing he sinned against the law of God and nature; knowing the act to

be forbidden by the law of the country was vague and indefinite." The true test was this: "was he capable of distinguishing right from wrong; *that is, right according to the law;* wrong, an act condemned and punishable by *the law!*"

We may therefore conclude, that incapacity of perceiving that the act was contrary to law, is in all cases sufficient evidence of insanity.

But is that the only test? Is the existence of such capacity, equally a test of sanity? Our leading case justifies us in claiming an additional test of insanity, viz.: *delusion*, or the fixed belief of the mind in the existence of things as realities, which have no existence but in the brain of the madman. *Hadfield's case*, before Lord KENYON, in 1800, is a striking illustration. It was proved that he had been a private soldier in a dragoon regiment, in the year 1793, received many severe wounds in battle, near Lisle, which had caused partial derangement of mind, and he had been dismissed from the army on account of insanity. Since his return to England he had been annually out of his mind, from the beginning of spring to the end of the dog days, and had been under confinement as a lunatic. When affected by his disorder, he imagined himself to hold intercourse with God; sometimes called himself God, or Jesus Christ, and used other expressions of the most irreligious and blasphemous kind, and also committed acts of the greatest extravagance; but at other times he appeared to be rational, and discovered no symptom of mental incapacity or disorder. On the 14th May, preceding the commission of the act in question, his mind was very much disordered, and he used many blasphemous expressions. At one or two o'clock on the following morning he suddenly jumped out of bed, and, alluding to his child, a boy of eight months old, of whom he was usually remarkably fond, said, he was about to dash his brains out against the bed-post, and that God had ordered him to do so; and, upon his wife screaming, and his friends coming in, he ran into a cupboard, and declared he would lie there, it should be his bed, and God had said so; and when doing this, having overset some water, he said he had lost a great deal of blood. On the same and the following day, he used many incoherent and blasphemous expressions. On the morning of the 15th of May, he seemed worse, said that he had seen God in the night, that the coach was waiting, and that he had been to dine with the king. He spoke very highly of the king, the royal family, and particularly of the Duke of York. He then went to his master's workshop, whence he returned to dinner at two, but said that he stood in no need of meat, and could live without it. He asked for tea between three and four o'clock, and talked of being made a member of the society of Odd Fellows; and after repeating his irreligious expressions, went out and repaired to the theatre. On the part of the crown it was proved that he had sat in his place in the theatre, nearly three quarters of an hour before the king entered; that on the moment when the audience rose on his majesty's entering his box, he got up above the rest, and presenting a pistol loaded with slugs, fired it at the king's person, and then let it drop; that when he fired his situation appeared favorable for taking aim, for he was standing upon the second seat from the orchestra, in the pit; and he took a deliberate aim, by looking down the barrel as a man usually does when taking aim. On his apprehension, amongst other expressions, he said that he knew perfectly well his life was forfeited; that he was tired of life, and regretted nothing but the fate of a woman who was his wife, and would be his wife a few days longer, he supposed. These words he spoke calmly and without any apparent derangement; and with equal calmness, repeated that he was tired of life, and said that his plan was to get rid of it by other means; he did not intend any thing against the life of the king, he knew the attempt only would answer his purpose.

The evidence for the defendant tended to show, and the memorable argument of the eloquent ERSKINE, was directed to convince the jury that the accused was laboring under a *sincere* and firm *delusion* that it was his duty to offer himself a sacrifice for his fellow men, to do some act by which he should be visited with the extreme penalty of the law; and the most ready way, as he conceived, to attain his object was to attempt the life of his sovereign, and thus draw upon himself that death he thought it his duty to undergo. This delusion, ERSKINE claimed, if the *cause* of the act complained of, rendered him irresponsible. This was a direct, and acknowledged innovation upon the law of insanity as then recognised by courts in England, and entirely inconsistent with the test of capability of distinguishing between right and wrong, already so often alluded to. For Hadfield *did know* right from wrong; *did know* that the act he was about to do was forbidden by the law; *did know* the nature and character of the penalty attached to murder; and more than this he was able to *calculate*, and did calculate the means necessary and proper to secure his end, and no sane man could have reasoned better in this respect than he. He made deliberate preparations to do an act, at a time and place, and in a manner, which whether successful or not, could not fail to draw upon him the fatal consequence he so much desired, and which, under an *overwhelming delusion*, he thought it his highest duty to suffer. There was unquestionably a method in his madness, but he must have been a responsible being according to the rule of Lord BROUGHAM, before stated; yet the whole facts and searching analysis of ERSKINE probably convinced all who heard it, that it would be a violation of law and of humanity to hold the accused accountable for the consequence of his delusion. And Lord KENYON, himself, after listening to the new position of the prisoner's counsel concurred in its wisdom, justice and truth, and advised the withdrawal of the prosecution.

Martin's case, for firing the Cathedral at York, is familiar to our readers. The insanity there relied upon was, as in *Hadfield's case*, delusion. He admitted he knew the act to be wrong, i. e. contrary to the law of the land, but he was laboring under the delusion, that he was commanded by a voice from heaven to burn the church on account of the sins of the clergy. He knew the nature of the act, and that it was punishable by law, since, when accused of having stolen the golden fringe, and other ornaments of the choir, he declared he did not wish to steal any thing, but kept them to furnish proof that he alone had committed the act, in obedience to his heavenly commission, so that no other person might bear the punishment. He also was acquitted; but if knowledge of right and wrong, or what is allowed and what is forbidden by law be the sole test of insanity, he was clearly responsible.

Another instance occurred in 1844, at the Central Criminal Court, *Regina* v. *Ross Touchett*, which illustrates the presence of insanity at the same time with the most perfect consciousness, that the act contemplated was forbidden by the law. The prisoner entered a shooting gallery, took a pistol and deliberately fired at the proprietor of the gallery, while his back was turned, and inflicted a wound which resulted in death. After firing his pistol, he said he did it on purpose, *for he wished to be hanged!* that he had no knowledge of the person he shot, but that he wished to be hung, and had brooded over suicide for some years. He referred to a case of a man who had just then been executed for shooting a man at Brighton, and said he wished to do something of the same kind, as he wished to be hung. Yet he was acquitted on the score of insanity. If knowing that his act was forbidden by the law constituted him sane, he was unjustly acquitted.

So in the next year, the case of *Regina* v. *Brixey*, at the Central Criminal Court, June, 1845. The prisoner was a quiet, inoffensive girl, a maid servant in a respectable family. She labored under a disordered menstruation, and had shown some unusual violence of temper a short time before. One day she procured a knife from the kitchen on some false pretence, and while the nurse was out of the room, cut the throat of her master's infant child. She then went down stairs and told her master what she had done, was perfectly conscious of the crime she had committed, and expressed much anxiety to know whether she would be hanged, or only transported. She was acquitted as insane, and as having done the deed under some delusion or irresistible impulse, probably caused by her obstructed menstruation. Delusion, too, was the phase of insanity relied upon in *Oxford's case*, who shot at the queen; believing it necessary, in order to accomplish some great public benefit.

McNaughten's case, in 1843, before referred to, furnishes another illustration of the same phase of insanity, namely, delusion or hallucination. The defendant was a Scotchman, and shot Mr. Drummond, the private secretary of Sir Robert Peel, in the streets of London, evidently mistaking him for Sir Robert himself. The act was done under circumstances showing great deliberation, coolness, and possession of intellectual powers. The defence was, that the prisoner was laboring under an insane delusion that he was the victim of some indefinite, mysterious, and incessant persecution; that he was every where followed by enemies, blasting his fame, disturbing his peace, accusing him of crimes, and filling him with intolerable inquietude. And believing Sir Robert Peel to be one of his persecutors, he resolved to sacrifice him. The fact of the existence of the delusion was supported by strong medical testimony; so strong, indeed, that TINDAL, Chief Justice, having inquired of Sir William Follett, conducting the prosecution, if he could control the testimony for the defence, thought it to be his duty to stop the case, and it was submitted without argument. The prisoner was acquitted, which gave rise to much discussion both in and out of the House of Lords, and led to the authoritative announcement of the law by all the judges before given. Whether the acquittal of McNaughten was consistent with the principles then laid down, especially in the answer to the first question, we leave our readers to judge; but that he was in fact insane, became afterwards clear to all.

Delusion, illusion, or hallucination, where there is no frenzy or raving madness, has also been declared to be the true legal test of insanity in the Ecclesiastical Courts. *Dew* v. *Clark*, 3 Addams, 79; *Frere* v. *Peacocke*, 1 Robertson, 442, a very excellent case on this subject. Our leading case, therefore, is well sustained, both on principle and authority. Indeed it is directly supported by the fourth answer of the judges in *McNaughten's case*, which, with the question, were as follow:

"If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?" To which the Judges said, "the answer must depend upon the nature of the delusion; but, making the same assumption as we did before, namely, that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. *For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment.* If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

This subject was ably examined by Nisbit, J., in *Roberts* v. *The State*, 3 Georgia, 310, (1847,) where the general rule that if a person has reason sufficient to distinguish between right and wrong in relation to the particular act to be committed, he is criminally responsible, was admitted to have this exception, that although the prisoner had such reason, yet if the act was done in consequence of some delusion which overpowered his will, and there was no criminal intent, he is not punishable, and the law of *Commonwealth* v. *Rogers* and *Hadfield's case* was expressly approved. The rule in Massachusetts was also approved in New York, in 1848, in *The People* v. *Pine*, 2 Barb. 571, where Barculo, J., says: — "There are cases in which the insanity consists in a delusion by which the prisoner has a real and firm belief in the existence of a fact wholly imaginary and unfounded. In regard to this, the English courts hold that it is no defence for a crime that the prisoner supposes he is redressing an injury or grievance. The Massachusetts rule is, that if the imaginary facts would justify the act, if true, then he is excusable; as when the prisoner supposed that the person was about to kill him, and he slays the other in self-defence. There must be an immediate apprehension of danger."

Numerous instances are on record, which sufficiently prove that persons really insane, may, and do commit acts, of the criminality of which they were at the time perfectly conscious. Indeed those who have had the care of lunatics tell us that they have heard undoubted lunatics boast that they could not be hung for the crime of murder, and that their insanity exempted them from punishment for violation of the law. When one really insane murders another in order to receive the punishment of death at the hands of the law, as in *Hadfield's case*, or commits a twofold murder, with the express declaration that he may as well suffer for both as for one, as in *Greensmith's case*, Midland Circuit, July, 1837, it is apparent that a capacity of distinguishing between what is allowed and what is forbidden by the law is not always conclusive evidence of sanity. Either all those persons who have been acquitted on the ground of insanity, when there was evidence of such knowledge, have been illegally acquitted, and justice has been sacrificed, or else the test of insanity so often laid down is an *imperfect* test.

Delusion, therefore, seems to be an equally sound and safe test of insanity, in many cases, as incapacity of knowing right from wrong. But this delusion ought to be so great in its extent and degree as to blind the person to his moral duty, in fact controlling his will, and rendering the commission of the act, in his view, a duty of overruling necessity. The act charged against him must also have been the direct result of his delusion; and to free him from responsibility, the delusion must have been directly connected with the act, driving him to its commission. An excellent illustration of this species of insanity is that perverted sense of religious obligation which causes men oftentimes to sacrifice their wives and children.

The two tests already named may, and often do, coexist in the same mind. In *Commonwealth* v. *Rogers*, the prisoner labored under a delusion, but which, at the same time, clouded his capacity of distinguishing right from wrong, and led him to believe that the act he contemplated was not wrong, either morally or legally, as indeed it would not have been, had the delusion been well founded in fact.

But will these two tests suffice? We defer the consideration of them to a future number.

E. H. B.

Recent American Decisions.

Superior Court of New Hampshire, Strafford, ss., July Term, 1852.

WOODMAN *v.* HUBBARD.[1]

Contracts on Sunday— Trover for the conversion of a horse hired on Sunday.

If the owner of a horse let him to be driven to one place, and the hirer voluntarily drives him beyond that place to another, this is a conversion of the horse, for which the owner may maintain trover against the hirer.

It is no defence to such an action that the horse was let on a Sunday, in violation of the statute for the observance of that day.

CASE. The action was tried upon the general issue. The first count in the declaration alleged that the plaintiff, on the 1st day of September, 1850, delivered to the defendant his, the plaintiff's, horse, to ride from the Great Falls Village in Somersworth, in this county, to South Berwick Village, in the State of Maine, and back again, and that the defendant so unreasonably and immoderately overloaded, drove and rode said horse that by reason thereof he died.

The second count was in trover for an alleged conversion of the horse, on the 1st day of September, 1850.

Upon the trial, it appeared in evidence that on the 1st day of September, 1850, which was Sunday, the defendant hired the plaintiff's horse to go from the Great Falls Village in Somersworth, to South Berwick Village, and agreed to pay a stipulated price therefor; that the defendant drove the horse to South Berwick Village on the morning of that day, and from thence to another place some miles beyond; that he returned with the horse to Great Falls Village on the evening of the same day, and re-delivered the horse to the plaintiff, and that soon afterwards the horse sickened, and in the course of the next day died.

There was evidence in the case tending to show that the death of the horse was occasioned by the unreasonable and immoderate driving of the defendant.

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[1] 5 Foster (N. H.) 67, (in press.) By the kindness of the Reporter and Publisher we are enabled to furnish, in advance of publication, the following interesting decision conflicting with that of the Supreme Court of Massachusetts, in the case of *Gregg* v. *Wyman*, 4 Cush. 322.

On the part of the defendant, it was contended that as the horse was let under a contract made on Sunday, and for the purpose of performing a service on that day, the defendant was not liable under either count in the declaration, although the jury should be satisfied that the death of the horse was occasioned by his immoderate driving. The court instructed the jury that the defendant could not be held liable under the first count in the declaration; but that if the defendant drove the horse to a place beyond that for which he was hired, and to which a fair understanding of the meaning of the parties in making the agreement for the use of the horse, would not authorize him to drive, it was a conversion of the property of the defendant at the time of his so driving him beyond the place agreed upon, for which he would be liable under the second count; and that a return of the property by the defendant to the plaintiff was to be considered in mitigation of the damages; and that in considering the question of damages, they should inquire whether the driving of the horse by the defendant after such conversion, and before the return to the plaintiff, occasioned or in any way contributed to the death or injury of the horse, and if so, that they should abate so much as the value of the horse might have been reduced thereby from the sum which otherwise they would have found to be the value of the horse at his return, and if they found that the driving after the conversion contributed to the death of the horse, and that he was of no value to the plaintiff when returned, they should assess the damages at the full value of the horse at the time of the conversion.

To which rulings and instructions of the court the defendant excepted. A verdict was rendered for the plaintiff, and the defendant moved that the same be set aside and a new trial granted on account of said alleged erroneous instructions.

R. Eastman, for the plaintiff; *Jordan* and *McCrillis*, for the defendant.

Perley, J. — It is a general and well established rule that no action can be maintained on a contract made in violation of law. When a contract is made on Sunday, and the making of it on that day is forbidden by the statute, the contract is void, though the thing contracted to be done may be lawful; as in a case of a promissory note to pay money which the maker owes to the payee. And a contract made on another day to do an act in violation of the law for the observance of the Lord's day would be void.

The provision of the Revised Statutes on this subject, ch. 118, § 1, is as follows: "No person shall do any work, business or labor of his secular calling, to the disturbance of others, works of necessity and mercy excepted, on the first day of the week, commonly called the Lord's day, nor shall any person use any play, game or recreation on that day, or any part thereof."

Whether the letting of a horse on Sunday is necessarily and in all cases a work or business to the disturbance of others, and whether every ride or drive made on a Sunday for mere relaxation and exercise must be regarded as an unlawful recreation within the meaning of the statute, it is not necessary in this case to decide. The instructions of the court to the jury went upon the ground that the contract was illegal, and in this respect were sufficiently favorable to the defendant. Was the other part of the charge correct, in which the court instructed the jury that if the defendant voluntarily drove the horse to a place beyond that for which he was hired, he was liable in trover?

If the owner places his property in the hands of another to be used temporarily for an unlawful purpose, or in any unlawful way, though the contract which he makes respecting the illegal use is void, he does not forfeit his property in the thing which he has thus delivered to another on an illegal contract. Where the property is intrusted to another to be wholly devoted and appropriated to an illegal purpose, perhaps the law is different; as in the case where goods are shipped to be carried to the public enemy.

In *Dwight* v. *Brewster*, 1 Pick. 51, the action was case, with a count in trover for a package of bank notes delivered to the defendant to be carried from Northampton to Springfield. The court (Parker, C. J.,) say: "The principal ground of defence to the action was, that by the law of the United States it was made unlawful for a carrier of the mail to take any letter or packet and deliver it to the person to whom it was sent, and that such mail carrier was made liable to a penalty for so doing; that if it was unlawful to carry, it must be unlawful to send, and that no action could be maintained for the non-performance of an undertaking that constituted an offence. The principle settled is, that a party to an unlawful contract shall not receive the aid of the law to enforce that contract, or to compensate him for the breach of it. It is not easy, however, to discern how a party to such contract, who becomes possessed

of the property of the other party, with which he is to do something which the law prohibits, can acquire a right to that property. The contract being void, the property is not changed if it remains in the hands of him to whom it was committed. If he has executed the contract with it, or it has become forfeited by judicial process, or if stolen or lost without his fault, he may defend himself against any demand of the owner in ordinary cases; but if he has it in his possession he must be liable for the value of it; and in an action of trover, with proper evidence of a conversion, the plaintiff would undoubtedly prevail." *Lewis* v. *Littlefield*, 15 Maine, 233, and *Phalen* v. *Clark*, 19 Conn. 421, are to the same point.

The same general doctrine is implied in *Frost* v. *Hull*, 4 N. H. 153; and we have seen no authority which tends to contradict the rule that in a case like this, though the contract may be void, the property in the thing bailed for the illegal use, remains with the former owner.

The property in the horse remained therefore in the plaintiff; and it would seem to follow as a necessary conclusion that for a direct, substantial invasion of that right, he might maintain the proper action against the defendant or a third person. In such an action he would not claim by or through the illegal contract, but would claim as the general owner of the horse, for an injury done to his right of property, which was antecedent to the contract, and not derived from it, nor defeated by it.

The action of trover is founded upon property in the plaintiff, and a conversion by the defendant. A conversion consists in an illegal control of the thing converted, inconsistent with the plaintiff's right of property. If one hire a horse to be driven to one place, and voluntarily drive him to another, it is a conversion, and trover will lie. *Wheelock* v. *Wheelright*, 5 Mass. 104.

This is in accordance with the law in other cases, where the bailee for one purpose diverts the thing bailed to another; as where a carrier uses, or sells, or delivers to the wrong party, the commodity which he received to transport. The circumstance that the property is in the hands of the bailee with the license of the owner to use it for one purpose, gives no right to use it for another; and the invasion of the owner's right of property is as complete, when the bailee goes beyond his license and duty, as if the control over the property were usurped without any bailment. There can

be no doubt, on the authorities, that trover would be a proper remedy in the case, if the illegality of the contract, on which the defendant took the horse into his possession, had not been set up as a defence.

If, however, though there has been in this case a technical, legal conversion, the real and substantial claim of the plaintiff is merely to recover damages for the breach of an illegal contract; if he must, notwithstanding the form of his action, claim in fact by and through his contract, he cannot evade the consequences of his illegal act by adopting a fictitious action, allowed in ordinary cases for the purposes of the remedy. In some cases the plaintiff, for convenience of his remedy, when his claim arises under a contract, is allowed to allege his gravamen in a criminal neglect of duty in the manner of performing, or in neglecting to perform, the contract. *Covett* v. *Radnidge*, 3 East, 62. But in such case, by varying the form of the remedy, the plaintiff cannot deprive his adversary of any defence, such as infancy, which he might have set up, if the claim had been made for a breach of the contract. *Jennings* v. *Randall*, 8 T. R. 335; *Green* v. *Greenbank*, 2 Marshall, 485, (4 C. L. 375;) *Fitts* v. *Hall*, 9 N. H. 441.

The question, then, becomes material whether the only real injury which the plaintiff suffered was by a breach of the contract; or whether the driving of the horse to another place was a substantial invasion of the plaintiff's right of property.

When the defendant voluntarily drove the horse beyond the limits for which he was hired, he acted wholly without right. He then took the horse into his own control, without any authority or license from the owner. The conversion was in law as complete, the wrongful invasion of the plaintiff's right of property was as absolute as if, instead of driving the horse a few miles beyond the place for which he had hired him, he had detained and used him for a year, or any other indefinite time, or had driven him to market and sold him. If taking the wrongful control of the horse, and driving him ten miles, was not a substantial conversion, how far must the defendant have driven him? How long must he have detained him? And what other and further wrongful acts was it necessary that he should do, in order to make himself a substantial and real wrong-doer? It would seem to be quite clear, that if the original act, assuming control over the horse, was not a substantial invasion of the

plaintiff's right of property, no subsequent use or abuse of the horse by the defendant could make it so; and that if the defendant cannot on the facts of this case be charged for the conversion of the horse, he could not have been if he had sold or wilfully destroyed him. In other words, the plaintiff having delivered the horse into the defendant's hands on a contract that was illegal, but which nevertheless left the general property in the plaintiff, the defendant may do what he will with the horse and the plaintiff can have no remedy, because whatever he does can be no more than a breach of his unlawful contract to return the horse. This does not appear to be a reasonable conclusion. The cases are not entirely unanimous as to what acts of a bailee, who receives goods on a void or voidable contract, are sufficient to make him liable for a tortious conversion. The question has arisen most frequently where infancy has been set up as a defence. *Vasse* v. *Smith*, 6 Cranch, 231; *Campbell* v. *Stokes*, 2 Wendell, 137; *Mills* v. *Graham*, 4 Bos. & Pull. 140; *Homer* v. *Thwing*, 3 Pick. 492, are strong authorities to the point that an infant who receives goods on a contract, and disposes of the property without right, is liable in trover; and these cases are cited and approved by the learned chief justice in *Fitts* v. *Hall*, 9 N. H. 443. *Wilt* v. *Welsh*, 4 Watts, 1, and perhaps *Jennings* v. *Randall*, 8 T. R. 366, must be regarded as somewhat in conflict with these cases. *Jennings* v. *Randall*, however, is criticised and doubted in *Fitts* v. *Hall*. *Homer* v. *Thwing*, 3 Pick. 492, maintains the position that in a case like this, driving the horse beyond the place for which he was hired, is a substantial conversion and a direct injury to the plaintiff's right of property, and not in substance a mere breach of the defendant's contract. In that case it was held that infancy was no defence to trover for such a conversion of a horse. If the action had been substantially upon the infant's voidable contract, he could not have been charged. We think the weight of authority and of argument are very decidedly in favor of the rule declared in *Homer* v. *Thwing*.

From these premises the conclusion would seem to follow that trover may be maintained on the facts of this case. If the plaintiff made an illegal contract respecting the horse, that contract is void; but the illegal contract being for a temporary use of the horse, the consequences do not extend to a forfeiture of the plaintiff's general right of pro-

perty; and for a wrongful invasion of that right he may maintain trover against the defendant, the *bailee*, or a third person. This is the doctrine of *Dwight* v. *Brewster*, 1 Pick. 51. In that case the contract was not only void, but illegal.

Driving the horse beyond the place for which he was hired is a wrongful invasion of the plaintiff's right of property, and a substantial conversion. In trover for such a conversion, the plaintiff's claim is neither in form nor in substance by, through, or under the illegal contract, and the invalidity and illegality of the contract are no defence to the suit. The contract is no link in the chain of the plaintiff's case; he shows the contract, which was invalid and illegal; but notwithstanding the contract and in spite of it, his right of property remained. That right has been directly invaded by the defendant's wrongful act, and this action is the appropriate remedy.

In this case, the defence set up is that the plaintiff's contract was not merely invalid, as in the case of infancy, but illegal; and that in showing the conversion of the horse, by driving beyond the place for which he was hired, the plaintiff was obliged to prove his own illegal act. It has been sometimes laid down in general terms that the plaintiff cannot recover, if, in order to make out his case, he is obliged to show his own illegal act. This is undoubtedly the rule where the plaintiff's illegal act is in whole or in part the foundation of his claim. In the cases usually cited as authorities for this rule, the plaintiff's claim was made through or under the illegal act. *Simpson* v. *Bloss*, 7 Taunton, 246, (2 C. L. 89;) *Fivaz* v. *Nichols*, 2 M. G. & S. 500, (52 C. L. 500.) But where the wrong is done to the plaintiff's property, and the facts are connected with an illegal contract respecting the property, which does not affect the plaintiff's right of property, these cases do not show that he cannot recover, because he is incidentally obliged to prove a contract which leaves his right of property untouched, and does not in its consequences reach to the case on which he relies. The illegal act of the plaintiff is in the case; *valeat quantum;* the question still remains, what is its effect on his right to recover?

Phalen v. *Clark*, 19 Conn. 421, which appears to have been a very well considered case, is strongly in point. The plaintiff in that case could not show his property in the lottery ticket, which was the subject of the suit, without show-

ing his illegal contract with the defendant, respecting the ticket; yet, as it appeared when the illegal contract was shown, that it did not extend to the plaintiff's property in the ticket, the court held him entitled to recover. The true rule is, we think, stated in that case as follows: "If the plaintiff requires any aid from an illegal transaction to establish his demand, he cannot recover it; or, in other words, if he is unable to support it without relying upon an unlawful agreement between him and the defendant, he must fail." 19 Conn. 432. Upon this point the dissenting opinion of Ellsworth, J., would not seem to weaken the authority of the case; for his dissent was put on the ground that the fraud of the defendant was committed in the execution of his illegal agency. He says: "The plaintiffs rest and must rest their claim to recover, on fraud in their agent, or fraud in a forbidden agency. The payment is an act in the progress and consummation of the illegal enterprise against the laws of this State." The majority of the court were of opinion that the illegal contract of the plaintiff was at an end, and that the injury was to the plaintiff's right of property in the ticket, notwithstanding the illegal contract which had been made respecting it. *Lewis* v. *Littlefield*, 15 Maine, 233, and *Dwight* v. *Brewster*, go to establish the same rule.

Nor is the plaintiff obliged to garble or suppress the facts of his case. When they all appear, his illegal act still leaves him his right of property in the horse, and his remedy for the conversion. It is not like the case of *Booth* v. *Hodgdon*, 6 T. R. 405, which was a claim made to recover premiums paid for illegal insurances, in which the plaintiff and one of the defendants had been jointly concerned.

One case of high authority we are obliged to regard as in conflict with the conclusion to which we have arrived, and that is the recent case of *Gregg* v. *Wyman*, 4 Cush. 322, in the Supreme Court of Massachusetts. The able and elaborate judgment in that case, and the great respect due to all the decisions of that court, have caused the principal hesitation which we have felt in holding that the present action could be maintained.

We understand the decision in *Gregg* v. *Wyman* to be put, in the first place, upon the ground that the claim of the plaintiff, though in form for a tort, was in substance to recover damages for the breach of the illegal contract. This position does not appear to be very confidently maintained,

and would seem to be entirely inconsistent with the case of *Homer* v. *Thwing*, 3 Pick. 492, decided in the same court. If the cases are are to be regarded as in conflict, we prefer the rule of *Homer* v. *Thwing*.

The other ground is that the plaintiff could not prove his case without showing the illegal contract by which the horse went into the defendant's hands; that he could not show the conversion of the horse by driving beyond the place for which he was hired, without showing the terms of the illegal contract; and, therefore, as he was obliged to show his own illegal act in making out his case, he cannot recover.

Granting that in order to show the wrongful act of the defendant, upon which he relied, the plaintiff was obliged to prove that he had made an illegal and void contract and violated the law, the question still recurs and remains whether the consequences of his illegal act affect his right of property in the horse, and whether the defendant's act was a direct injury to that right, or only in substance a breach of the illegal contract. The general property remained in the plaintiff. That does not seem to be any where denied, and is the express doctrine of *Dwight* v. *Brewster*, and is necessarily involved in *Phalen* v. *Clark* and *Lewis* v. *Littlefield*. It would not seem to follow as a legal or a logical consequence, that because the plaintiff had made an illegal contract respecting the horse, which still left the property in him, that though the illegal contract necessarily appeared in the plaintiff's proof of a direct and substantive injury to his property, no recovery could be had. The illegal contract appears in the case; the plaintiff has violated the law, and the contract is void. What then? The plaintiff's property in the horse still remains. Was the act of the defendant within the limits and scope of the contract, and a mere breach of it? If so, he is not liable. But if the act was not covered by the contract, and done within it and under it, but was a direct voluntary wrong to the plaintiff's right of property, he may recover. The reasoning of the court in *Gregg* v. *Wyman*, is quite conclusive to show that the plaintiff, having absolute power over his own property, and having delivered it to the defendant, the plaintiff can never show that the defendant has done any wrong to his right of property without showing the contract on which it was delivered. So if the defendant should refuse to deliver the horse on demand, or should

sell him or destroy him, it would in none of these cases appear that any wrong had been done to the plaintiff until he showed the contract, and that the act of the defendant was not under and within it. Whether the horse was delivered on a sale to the defendant, or on an agency to sell, would not appear without evidence of the contract. It necessarily follows from this view of the case, that a man is wholly without remedy for any injury that may be done to the horse he lets on Sunday, in violation of law, if the necessity of showing his illegal contract will preclude his recovery. Though the property is conceded to remain in the plaintiff, he has no remedy to enforce his right, because he cannot show it without showing the illegal contract of letting. And in all the numerous cases where horses are illegally let on Sunday, the hirer might with perfect impunity retain or sell them. This appears to us to be pushing the application of a well settled principle to an unnecessary and extravagant length, not required nor warranted by the general current of the authorities. We are of opinion that the instructions of the court were correct, and that there must be judgment on the verdict.

We do not understand that we are by this decision infringing upon the rule that no action can be maintained on a contract made in violation of law; we mean to leave that principle wholly untouched; but are of opinion that it does not reach to this case.

Superior Court of New Hampshire, Strafford, December Term, 1848.

VARNEY *v.* FRENCH.

Contracts on Sunday.

The act of December 24th, 1799, prohibited the transaction of secular business on the Lord's day under a penalty, without any qualification whether it were performed by a person alone, or in company with others.

The first section of chapter 118 of the Revised Statutes so far altered the law, that it prohibited the transaction of secular business on the Lord's day, only when it was done to the disturbance of others.

Any business tends to the disturbance of others, and is consequently prohibited, which withdraws the attention from the appropriate duties of the Sabbath, and turns it to other things.

An act done by a person is none the less a disturbance within the meaning of the statute, although other persons present may not object to its performance.

A contract for the sale of a mare was made on Sunday, and a promissory note for the price was executed and delivered on that day. The note was given at the house of the plaintiff, whose wife was present in the room where the contract was made, reading a newspaper, and she and a witness were the only persons present when the contract was made, except the parties. *Held*, that the act of giving the note was a business of a secular calling, tending under the circumstances to the disturbance of others, within the meaning of section 1, chapter 118 of the Revised Statutes, and that no action could be maintained on the note.

Assumpsit on a promissory note made by the defendant, and dated on the 28th day of August, 1847, for the sum of $80.00, payable to the plaintiff on demand. The writ was dated on the 9th day of December, 1847.

Plea the general issue, with a brief statement, alleging, among other things, that the note was given, and the contract forming its consideration, made on Sunday.

At the trial, it appeared that the note was given for the purchase-money of a mare, that the contract of sale was made on Sunday, and that the note was written, signed and delivered on that day, and was antedated that it might not bear date on Sunday. The note was given at the house of the plaintiff, and his wife was present in the room while the conversation was going on, and when the note was given, reading a newspaper, and no other person was present except the parties and the witness who went to the house with the defendant.

The court instructed the jury that the fact that the note was made on Sunday was no bar to the plaintiff's right to recover.

The jury returned a verdict for the plaintiff, which the defendant moved to set aside.

Christie, for the plaintiff; *Woodman*, *Eastman*, and *J. S. Wells*, for the defendant.

Gilchrist, C. J. — The act of December 24th, 1799, prohibits any person from doing or exercising any labor, business or work of his secular calling upon the Lord's day, under a penalty of from one to six dollars. N. H. Laws, 167, (Ed. of 1830.)

Under this statute it was held, in the case of *Frost* v. *Hall*, 4 N. H. 153, that the seizure of swine found at large, in violation of law, by a hogreeve, was a work or business belonging to a secular calling within the meaning of the statute, and as such prohibited. In the subsequent case of *Shaw* v. *Dodge*, 5 N. H. 462, it was held that the service of civil process fell within the prohibition, was

unlawful, and could not be justified if done upon the Lord's day. And the doctrine of these cases seems to be recognized in *Clough* v. *Davis*, 9 N. H. 500, although in that case it was unnecessary to decide whether the note on which the action was brought was void as having been made on Sunday. But in the case of *Allen* v. *Deming*, 14 N. H. 133, it was decided that the execution and delivery of a promissory note on Sunday was "business" of a person's "secular calling," and as such was prohibited under a penalty, and that the note was void.

The law remained in this condition until after the passage of the Revised Statutes. It is there enacted, by § 1, c. 118, that no person shall do any work, business or labor of his secular calling to the disturbance of others on the Lord's day, under a penalty.

The question then arises, what alteration, if any, has been made in the law by this section? What is the meaning of the words "to the disturbance of others?"

As to the point whether the legislature intended to alter the law in this particular, we entertain no doubt. The law had been generally understood from the Reports, and the substantial re-enactment of the former statute, with the insertion of these words, renders it sufficiently apparent that some modification of the former law was intended. And there is an evident distinction between the two statutes, apparent from reading them together and comparing them. The act of 1799 prohibits the exercise of the *secular calling*, without any qualification. Whether it be exercised alone or in the midst of a city, whether it be carried on by the offender without assistance, or conjointly with others, whether there be witnesses to the act, or he be tried and convicted on his own confessions alone, the transaction is equally within the prohibition of the statute. It makes no difference whether the calling be a quiet and noiseless pursuit, carried on in the person's own house, or one which attracts the public attention, and is accompanied by noise and clamor. It is enough that the pursuit is a business of the secular calling of the individual. The statute goes farther than merely to protect the public peace, and punishes the offender, not simply because the public quiet is endangered, or may be so, but because the act is considered to be wrongful in itself and produces an injurious effect upon him who performs it. It has both an individual and a general purpose. While it protects the

solemnities of religion from interruption, and secures the public in their peaceful performance, it reminds the individual that he has religious duties to fulfil, and religious duties alone. It tends to secure to him time and opportunity for their fulfilment by prohibiting him from performing other things, and induces him to turn his attention for one day in the week to religious reflection, by refusing him permission to distract his mind by occupying himself with his worldly affairs. It cannot legislate him into a religious man, but it keeps him from business, and forbids business to come to him, and aims at doing what may reasonably be attained without infringing his freedom of conscience.

Such is, in our view, the fair and reasonable construction of the act of 1799, and it is proper to inquire into the construction of the first section of chapter 118 of the Revised Statutes, in order to see what change has been effected from the former law.

In the first place, it is obvious that it is not considered expedient by the Revised Statutes to attempt to attain one object which the act of 1799 had in view; that is, the good effect upon the individual, by prohibiting him from exercising his secular calling. By the act of 1799 he could not do this under any circumstances. By the Revised Statutes he may do it with a qualification, a condition, and that is, that it be not "to the disturbance of others." This provision aims only at protecting the public in their devotions and religious reflections; others, the law says, shall not be disturbed. It leaves each individual to employ himself as he may choose, subject only to this limitation. It does not aim at guarding him from himself. It does not seek to interest him in religion, by forbidding him to interest himself in things not religious. It leaves him to his own conscience, and does not attempt to furnish any other guarantee for the religious and devotional employment of his time, than such as may be afforded by his own views of his religious obligations.

This, then, is an important change in the law. It shows that there is a radical difference in the theories on which the two statutes proceed. How much farther the legislature intended to go, what meaning they probably attached to the words "to the disturbance of others," is a subject for further inquiry.

The word "disturbance" has no such intrinsic force and meaning as would enable us to determine its effect, apart

from the connection in which it appears. Any thing which throws into confusion things settled, which interrupts the movements, pursuits or thoughts of another may be a disturbance. So if it distract his attention, call his mind off from one train of thought and divert it to another, it may be said to disturb him. A thousand things might or might not disturb others in fact, according to their then existing pursuit, and this renders it an extremely difficult thing to lay down a general rule which shall definitely settle what is or is not a disturbance. If nothing can be considered a disturbance which people willingly submit to, and take a part in, then the legislature did not intend to prohibit any assembly of persons for whatever purpose, provided the people present are willing to give up their religious duties and take part in whatever is done. In such case, they could have no cause for complaint; *volenti non fit injuria;* no disturbance has been caused to *them.* Upon this principle, a horse race in a public street would be no disturbance if the people chose to desert the churches and assemble on the race-ground. A military parade on the Sabbath would not be prohibited, if the bystanders or those who heard it, preferred military to sacred music. A theatre or a circus, a menagerie or a political caucus, would no more be *disturbances* than would the services in the churches. But we do not think that such would be the true construction of the act. We think it evident that in one respect a radical change has been made, and that the act had a certain intelligible purpose in view, and we are not called upon to construe the statute away, and endeavor to ascertain how few cases can come within it. The only safe meaning we can give to the word "disturbance" is a comprehensive one, going upon the ground that the main purpose of the law was to relieve an individual from the penalty who had been guilty of no act that actually did, or that tended to disturb and distract the minds of others from those religious observances which the act unquestionably intended to respect. Such being the object of the statute, nothing should be tolerated that tends to defeat it. If a person should desire to buy a horse, he would have no right to go to the owner on the Sabbath and make his propositions for the sale, because that would tend to disturb the quiet of the owner on the day which the statute intended should be respected. And even if the owner be willing to be thus disturbed, that willingness will not make

the contract valid, for the disturbance is prohibited by the statute. The parties would be *in pari delicto.* In the case before us, the defendant took with him a witness, so that in addition to the disturbance to the plaintiff, there is the further violation of the letter and spirit of the act in regard to the witness, and also the additional interruption to the plaintiff's wife. That these were "disturbances" within the meaning of the act we are fully satisfied, and any other construction would enable any number of people who were desirous of doing so, to engage in any business or amusement which those who should see and hear might find their pleasure in, and to such an extent we think the legislature never intended to go.

The contract, then, having been made on Sunday, was void, as being prohibited under a penalty, upon which point it is unnecessary to cite authorities. It is equally clear that there can be no ratification of a void contract. A sale of the mare by the defendant could not have that effect. We cannot lose sight of the fact that the defendant obtained her, and the plaintiff parted with her in pursuance of a contract made on Sunday. The plaintiff, then, can maintain no suit upon or for any matter founded upon the contract, for he does not come into court with clean hands. In such a case, a recovery is forbidden, not because any favor is felt for the defendant, who is equally guilty with the plaintiff, but, as Mr. Justice Woodbury says in *Chauncey* v. *Yeaton*, 1 N. H. 156, speaking of illegal contracts, "on account of the impurity of the subject-matter of the claim, and the pollution which soils the plaintiff in connecting himself with that subject-matter."

Cases of seeming hardship may easily be imagined, where a person who happened to be present might ungraciously interpose his veto upon a transaction, by alleging that the business, however quietly transacted, was a disturbance to him. But this result is necessary, and no ingenuity can avoid it, and cases may happen, as they do under the application of all general rules, where injustice may be done. If, however, the natural tendency of an act be to attract the attention of others, how many persons must be affected by it before it can assume the character of a disturbance? Where shall the line be drawn? If a disturbance to a solitary individual be not enough, how will it be if there are ten persons to be affected, or a hundred? It is evident that it would, in all cases, be a question

of the application of a principle, and not of convenience or inconvenience, and the rule must be applied in all cases that come within it, whatever results might follow.

Verdict set aside.

Miscellaneous Intelligence.

French Police. — A criminal, from the United States, named Ainsley, alias Dupont, has been reclaimed and sent home this week by the French authorities, which is the first case of reclamation that has occurred under the extradition law of 1852, between France and the United States. The incomprehensible power of the Paris Police was never more thoroughly displayed than in the arrest of this man. Ainsley committed a forgery on the Bank of Louisiana for a large sum — I believe fourteen thousand dollars. He escaped to Europe, and rapidly squandered his money in gambling, debauchery, and high living, mostly at the baths of Germany and Paris. He entered France under the assumed name of Dupont, with a passport bearing that name, and with a personal appearance which answered to the passport.

After he had remained in Paris some time, leading a most dissolute life, a reclamation arrived from the United States at the Prefecture of Police in this city, asking for the arrest of this man, if he was in Paris. Out of the more than hundred thousand foreigners in this great city, the police had nothing to guide them but the name Ainsley, and the description of his person. Yet this name, it must be recollected, was known to no one in Paris, since it was not on his passport. There was, then, nothing but the description of his person, so far as the public knows of the operation of this inscrutable power, to serve as a guide in his detection. Yet, on the second day after the arrival in Paris of the order from New Orleans, Ainsley found himself under bars and bolts in the old Conciergerie prison. When one reflects that this was accomplished in the midst of a crowded population of twelve hundred thousand persons, where there are always ten times more visitors from foreign nations than in any other city in the world, that Ainsley talks French and looks like a Frenchman, he gains some idea of the power of this police, and realizes why it is that crime is so unfrequent at Paris, compared to other large cities. It is positively frightful to think of the extent of this power, and of the certainty with which every man's identity must be known, and his most intimate movements watched and recorded.

Ainsley had elegantly furnished apartments in the fashionable Rue de Choiseuil, where he was *en menage* with a French girl named Louise Dupont. When the Commissary of Police entered the apartment, Ainsley was reading in slippers and robe-de-chambre, while his mistress was engaged in needle-work. The commissary demanded of Ainsley his name. "They call me Dupont," was the reply. "And your name, Mademoiselle?" "Louise Dupont." Looking Ainsley sharply in the face, the commissary said: "It may be the custom in your country when a man marries to take the name of his wife, but in France it is the reverse. I have evidence that you are living under a false name. Your real name is Ainsley; you are an American; and I arrest you for forgery on a bank in New Orleans." Ainsley made no sign of surprise, but the girl, more

impressible, almost sprang from her chair, and uttered a cry of surprise. The prisoner at first denied his identity, but, when brought before the Judge of Instruction at the Palais de Justice, he avowed all. He leaves in a packet-ship from Havre this week, in the care of the captain. —*Corr. New York Tribune.*

THE BASIS OF TRADE. — The answers made by a person called Joseph Windle Cole, in the Court of Bankruptcy a few days ago, to certain questions touching his business and the mode in which he carried it on, gave melancholy proof of the dangerous extent to which unprincipled manœuvring to raise the wind, so as to carry on business without capital, is practised in this great hive of commerce. In answer to one of these questions Cole said: "I had been bankrupt in 1847, and had no capital when I recommenced business, except loans from friends." In answer to another, he replied: "My transactions were very extensive; in 1853 I should think about two millions."

These two answers, when placed in close connection, are most astounding. Here is an extent of business done *without any real capital* equal to the trade between many two countries, and sufficient, had it been a *bonâ fide* trading, to have placed the person who directed it among the merchant princes of the world. The correctness of these answers might well be doubted, owing to the almost inconceivable possibility of the fact, were they not supported by facts which cannot be gainsaid. One of them is, that debts to the amount of £200,000 have already been proved under Cole's bankruptcy. Who will say after this, "*ex nihilo nihil fit?*" Imagination is bewildered in endeavoring to trace the rise of a trade of two millions per annum out of nothing at all. The manner in which this trade was carried on was in keeping with its commencement. "I kept no cash-book, ledger, or journal; I made my banker's check-book a rough cash-book." Rough enough, indeed! "I should have spoilt my operations if I had allowed my clerks to keep a journal." This, we think, is very probable, but such a *naive* confession is very striking. — *Corr. National Intelligencer.*

NOTICE. — We apologize to our readers and correspondents for the delay in the publication of this number, and for the omission of articles which will appear in our next. We beg them to find some compensation in the interest or value of those contained in the present number for their length and want of variety.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Adams, John Q.	Boston,	Dec. 8, 1854,	John P. Putnam.
Adams, Samuel*	Beverly,	" 30,	John G. King.
Allen, Emery A.	Randolph,	Jan. 3, 1855,	Samuel B. Noyes.
Amadon, Ethel T.†	Randolph,	Dec. 12, 1854,	Samuel B. Noyes.
Atwood, Joshua	Carver,	Nov. 21,	John J. Russell.
Atwood, Moses	Georgetown,	Dec. 13,	John G. King.
Bacon, Avery	Barre,	" 7,	Charles Brimblecom.
Baker, George W.	Stoughton,	" 22,	Samuel B. Noyes.
Barrett, Samuel G.	Bridgewater,	" 29,	Welcome Young.
Bates, Franklin	Fairhaven,	Sept. 22,	Joshua C. Stone.
Bell, John, Jr.	East Bridgewater,	Dec. 19,	Welcome Young.
Blackinton, Oliver	Rowley,	" 30,	John G. King.

* For Notes to the above references, see next page.

Name of Insolvent.	Residence.	Commencement of Proceedings	Name of Commissioner.
Blodget, John W. †	Boston,	Dec. 11, 1854,	Charles Demond.
Bodfish, David P. §	Haverhill,	" 14,	N. W. Harmon.
Bradford, Wm. R.	Boston,	" 12,	John P. Putnam.
Brock, Ephraim	Lynn,	" 26,	John G. King.
Brown, Horatio G. Jr.	Boston,	" 12,	John P. Putnam.
Bruce, Silas	Townsend,	" 15,	Asa F. Lawrence.
Bundy, J. C. ‡	Boston,	" 11,	Charles Demond.
Burbeck, Lucius D.	East Bridgewater,	" 28,	John J. Russell.
Byron, George E. ‖	Boston,	" 25,	N. W. Harmon.
Caldwell, Wm.	Rockport,	" 25,	John G. King.
Clapp, John P.	Dorchester,	" 21,	Francis Hilliard.
Colburn, Willis H.	Boston,	" 23,	John P. Putnam.
Couch, Wm. G.	Lee,	" 1,	Lorenzo H. Gamwell.
Cummings, Daniel	Woburn,	" 22,	Asa F. Lawrence.
Dolliver, Thomas H.	Lawrence,	Nov. 18,	N. W. Harmon.
Drake, Charles C.	Marlboro,'	Dec. 18,	Asa F. Lawrence.
Farrar, Isaac	South Scituate,	" 18,	Welcome Young.
French, Wm. P. ¶	Boston,	" 26,	Charles Demond.
Glendon Rolling Mills,	Boston,	" 18,	John M. Williams.
Goodnow, A. ‡	Boston,	" 11,	Charles Demond.
Gore, W. Jr. ‡	Boston,	" 11,	Charles Demond.
Hall, Hiram L.*	Beverley,	" 30,	John G. King.
Hancock, Franklin	Boston,	" 26,	John P. Putnam.
Harris, Samuel D.	Milford,	" 26,	P. G. Kent.
Harvey, Horatio N. §	Haverhill,	" 14,	N. W. Harmon.
Heywood, Benjamin	Worcester,	" 30,	Alexander H. Bullock.
Hovey, Abner B.	Stoneham,	" 13,	Asa F. Lawrence.
Johnson, Benjamin	Malden,	" 8,	Isaac S. Morse.
Jones, George W.	Ashland,	" 27,	Isaac S. Morse.
Jones, Owen	Salem,	" 26,	John G. King.
Kelly, Ignatius A.	Boston,	" 26,	Charles Demond.
King, Joshua H.	Abington,	" 5,	Welcome Young.
Lamson, Alvin F.	Boston,	" 22,	John P. Putnam.
Lemist, Edwin	Roxbury,	" 16,	Samuel B. Noyes.
Lombard, Augustus	Charlestown,	" 7,	Isaac S. Morse.
Mandell, T. S. ‡	Boston,	" 11,	Charles Demond.
Moody, Saml. Sewell	Newbury,	" 12,	N. W. Harmon.
Moore, Gardner	Wayland,	" 12,	Josiah Rutter.
Parker, Wm. C.	Lowell,	" 4,	Isaac S. Morse.
Parkhurst, Austin N.	Winchendon,	" 21,	C. H. B. Snow.
Payne, Zebulon, Jr.	Ashfield,	" 13,	David Aiken.
Peabody, Charles ‖	Newburyport,	" 25,	N. W. Harmon.
Pettigrew, Thomas	Boston,	" 19,	John P. Putnam.
Pollard, Gorham L.	Lowell,	" 15,	Isaac S. Morse.
Preble, Rufus S.	Canton,	" 23,	Samuel B. Noyes.
Putnam, Lorenzo R.	Washington,	Nov. 15,	Charles N. Emerson.
Read, Joseph	Charlestown,	Dec. 20,	Isaac S. Morse.
Rettger, Nicholas	Chelmsford,	" 8,	Isaac S. Morse.
Ross, James ¶	Boston,	" 26,	Charles Demond.
Stone, S. S. ‡	Boston,	" 11,	Charles Demond.
Swift, Joseph	Charlestown,	" 21,	Isaac S. Morse.
Taylor, Sereno E. D.	Lynn,	" 20,	N. W. Harmon.
Tinkham, Frank J.	Boston,	" 8,	John P. Putnam.
Tirrell, Norton Q.	Weymouth,	Jan. 2, 1855	Samuel B. Noyes.
Turner, Wm. H.	Lowell,	Dec. 14, 1854,	Isaac S. Morse.
Walker, George	Brookline,	" 11,	Samuel B. Noyes.
Wall, Charles E.	New Bedford,	Nov. 3,	Joshua C. Stone.
Watts, Horatio C.	Concord,	Dec. 2,	Josiah Rutter.
Webb, Nathan H.	Pittsfield,	" 12,	Charles N. Emerson.
Wild, Jonathan	Braintree,	" 23,	Samuel B. Noyes.
Willard, Wm. D.	West Roxbury,	" 18,	John M. Williams.
Winn, Parker	Boston,	" 14,	John P. Putnam.

* Eagle Rubber Company and Beverly Rubber Company.

† Proceedings stayed by Supreme Court until February term.

‡ J. W. Blodgett & Co.

§ Bodfish & Harvey.

‖ George E. Byron & Co.

¶ Partners. Firm not stated.